Supreme Court, U.S.
FILED
93 1107 JAN 10 1994
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES RICKY JONES
AND VERA JONES ..... PETITIONERS,

versus

CITY OF CARLISLE,
KENTUCKY ..... RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT LESLIE ROSENBAUM, ESQ.
Counsel of Record for Petitioners
ROSENBAUM & ROSENBAUM, P.S.C.
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507-1289
(606) 259-1321

FRANK H. McCARTNEY, ESQ.
SUIT, McCARTNEY & PRICE
207 Court Square
Flemingsburg, Kentucky 41041
(606) 849-2338

PRINTMASTER, INC., 746 WESTLAND DR., LEXINGTON, KY 40504, PH. (606) 281-6657

95 pp

QUESTION PRESENTED FOR REVIEW

Whether in a suit alleging municipal liability as per 42 U.S.C. Section 1983, it is necessary to plead and prove a "special relationship" in a fact situation where abusive, municipal policies of refusing to enforce state law and of refusing to train its police force combined with the actions of a private individual to cause the constitutional deprivation?

PARTIES

The parties to this Petition are James Ricky Jones and Vera Jones, Petitioners, and City of Carlisle, Kentucky, Respondent.

Other parties in the proceedings before the United States Court of Appeals for the Sixth Circuit were AIK Selective Self-Insurance Fund, Preferred Risk Mutual Insurance Company, and Mark Byrd. These parties have no interest in the outcome

There are no parent nor subsidiary companies of the parties to this petition.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1-2

STATEMENT OF THE CASE 2-7

ARGUMENT 8-23

I. THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT 8-14

II. THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS RENDERED A DECISION WHICH CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS 14-23

APPENDIX A
OPINIONS BELOW ..... 1a - 36a

APPENDIX B
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED ... 37a-49a

APPENDIX C
COMPLAINT 51a-64a

TABLE OF AUTHORITIES

Cases: Page

Balistreri v. Pacifica Police Dept.,
901 F.2d 696 (9th Cir. 1990) 20

Black by Black v. Indiana Area School Dist.,
985 F.2d 707 (3rd Cir. 1993) 17

Brown v. Grabowski,
922 F.2d 1097 (3rd Cir. 1990) 17

Canton v. Harris,
489 U.S. 378 (1989) 6, 11, 16

Collins v. City of Harker Heights, Tex.,
U.S. ____ , ____ 112 S.Ct 1061 (1992)..... 14

Cornelius v. Town of Highland Lake, Ala.,
880 F.2d 348 (11th Cir. 1989) 21

D.R. By L.R. v. Middle Bucks
Area Vo. Tech. School,
972 F.2d 1364 (3rd Cir. 1992) 17

Daniels v. Williams,
474 U.S. 327 (1986) 14

Dawson v. Milwaukee Housing Authority,
930 F.2d 1283 (7th Cir. 1991) 19

DeShaney v. Winnebago, Cty. Dept.
of Soc. Services,
812 F.2d 298 (7th Cir. 1987) 9, 18

Cases: Page

DeShaney v. Winnebago Soc. Serv.,
489 U.S. 189 (1989) 6, 7, 8, 9, 10
11, 12, 14, 17, 18,
19, 20, 21, 23

Doe v. Taylor Independent School Dist.,
975 F.2d 137 (5th Cir. 1992) 18

Dwares v. City of New York,
985 F.2d 94 (2nd Cir. 1993) 17

Gibson v. City of Chicago,
910 F.2d 1510 (7th Cir. 1990) 18, 19

Gregory v. City of Rogers, Ark.,
974 F.2d 1006 (8th Cir. 1992) 19

Harris v. District of Columbia,
932 F.2d 10 (D.C. Cir. 1991) 16

Hilliard v. City and County of Denver,
930 F.2d 1516 (10th Cir. 1991) 20

Janan v. Trammell,
785 F.2d 557 (6th Cir. 1986) 6, 14, 15

K.H. Through Murphy v. Morgan,
914 F.2d 846 (7th Cir. 1990) 19

L.W. v. Grubbs,
974 F.2d 119 (9th Cir. 1992) 20

Cases: Page

Maldonado v. Josey,
975 F.2d 727 (10th Cir. 1992) 20

Martinez v. California,
444 U.S. 277 (1980) 6, 9, 14

McKee v. City of Rockwall, Tex.,
877 F.2d 409 (5th Cir. 1989) 18

Monahan v. Dorchester Counseling Center, Inc.,
961 F.2d 987 (1st Cir. 1992) 16

Monell v. New York City Dept. of Soc. Serv.,
436 U.S. 658 (1978) 12

Monroe v. Pape,
365 U.S. 167 (1961) 12, 13, 23

Nishiyama v. Dickson County, Tenn.,
814 F.2d 277 (6th Cir. 1987) 15

Piechowicz v. U.S.,
885 F.2d 1207 (4th Cir. 1989) 17

Salas v. Carpenter,
980 F.2d 299 (5th Cir. 1992) 18

Salazar v. City of Chicago,
940 F.2d 233 (7th Cir. 1991) 19

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989) 20

OPINIONS BELOW

Appended hereto is the Memorandum Opinion and Order, filed June 12, 1992, by the United States District Court for the Eastern District of Kentucky; the Order, filed July 21, 1992, by the United States District Court for the Eastern District of Kentucky overruling Petitioners' Motion to Alter, Amend, or Vacate the prior District Court Opinion; the Opinion, filed August 27, 1993, by the United States Court of Appeals for the Sixth Circuit; and the Order, filed October 13, 1993, of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Petition for Rehearing.

JURISDICTION

The date of entry of the Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky is June 12, 1992, the date of entry of the Opinion of the United States Court of Appeals for the Sixth Circuit is August 27, 1993, and the date of the Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing is October 13, 1993. This Petition for Writ of Certiorari is timely filed pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States within 90 days subsequent to the denial of the timely filed Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit. This Court's jurisdiction is invoked as per 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following are the constitutional, statutory and regulatory provisions involved in this case and are reprinted verbatim in the appendix hereto:

U.S. Const. Amend. XIV, Section 1

42 U.S.C. Section 1983

Kentucky Revised Statute Section 95.015 (Michie ed.)

Kentucky Revised Statute Section 95.710 (Michie ed.)

Kentucky Revised Statute Section 95.760 (Michie ed.)

Kentucky Revised Statute Section 95.740 (Michie ed.)

Kentucky Revised Statute Section 186.570 (Michie ed.)

Kentucky Revised Statute Section 189.290 (Michie ed.)

Kentucky Revised Statute Section 189.635 (Michie ed.)

Kentucky Revised Statute Section 431.450 (Michie ed.)

601 Kentucky Administrative Regulation 13:010

STATEMENT OF THE CASE

This case originated in the United States District Court for the Eastern District of Kentucky. Jurisdiction was invoked pursuant to 42 U.S.C. Section 1983, 28 U.S.C. Section 1331, and 28 U.S.C. Section 1334.

All factual statements appear in the Petitioners' Complaint (District Court Docket No. 1) unless otherwise noted.

Petitioner, James Ricky Jones, is a citizen of the United States of America and a citizen of the Commonwealth of Kentucky. Petitioner, Vera Jones, is the wife of James Ricky Jones and joins in this Petition in order to preserve her rights under pendent claims in the event this litigation continues. Respondent, Carlisle, Kentucky, is a municipality existing by authority of the law of the Commonwealth of Kentucky and maintaining a police force pursuant to the same authority. Carlisle is the county seat of Nicholas County, Kentucky.

Mark Byrd, at all relevant times, was a citizen and resident of the Commonwealth of Kentucky, primarily residing in Carlisle, Kentucky. Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since infancy.

On or about November 13, 1990, Byrd was operating a motor vehicle on a public highway in Nicholas County, Kentucky, when he experienced an epileptic seizure which caused him to lose control of his vehicle and to have his vehicle cross the center line of the highway into the oncoming lane of traffic where the Byrd vehicle struck head-on a motor vehicle then and there operated by the petitioner, James Ricky Jones. Petitioner was severely and permanently injured as a result of this accident.

Byrd had been involved in numerous motor vehicle accidents and mishaps prior to the accident with petitioner. All of the motor vehicle accidents were occasioned by Byrd's suffering epileptic seizures while operating motor vehicles.

Carlisle police possessed actual knowledge that Byrd was unfit to operate a motor vehicle because of his seizure disorder. This knowledge was gained from investigating many of the accidents caused by Byrd's epilepsy. (Deposition testimony of Ronald Clark, Ronald McDonald, and Darryl McFarland, appended to District Court Docket No. 32).

The statutory law of the Commonwealth of Kentucky is embodied in the Kentucky Revised Statutes, Michie edition (hereinafter "KRS"). Kentucky's statutory obligations for Carlisle police are itemized in the complaint, appended hereto. State law requires Carlisle police to enforce the law of Kentucky, to be sagacious, to faithfully perform their duties, to use uniform citations for traffic law violations, to file written reports of automobile accidents causing prop-

erty damage or personal injury, and state law also gives Carlisle police law enforcement power and responsibility throughout Nicholas County, Kentucky.

At the time of the accident involving petitioner, Byrd possessed a valid motor vehicle operator's license issued by the Commonwealth of Kentucky. The law of the Commonwealth of Kentucky evidences a policy to withdraw the motor vehicle operator's license of a person having a mental or physical infirmity making that person unsafe to operate a motor vehicle. see, KRS 186.570. State policy as evidenced by 601 Kentucky Administrative Regulation 13:010 is to remove the operator's license from a person who has suffered a seizure prior to a reportable motor vehicle accident upon notification to the Commonwealth of Kentucky that a motor vehicle operator has suffered an epileptic seizure. There is no explicit statutory or regulatory requirement for local law enforcement officials to report epileptic drivers to state government in Frankfort, Kentucky, where the epileptic driver's operator's license would be revoked by the Medical Review Board which is an office in the Kentucky Transportation Cabinet, a division of state government. However, the Medical Review Board opens approximately 600 new cases per year, and one-half to three-fourths of these cases come about by virtue of reports from law enforcement officials. Had the Kentucky Medical Review Board been aware of Byrd's epilepsy-related accidents, Byrd's operator's license would have been suspended. (Deposition testimony of Valerie Taylor, p. 19-25, 35-36, District Court Docket No. 20a). Byrd has stated that if he had not possessed a valid operator's license at the time of his accident with petitioner, he would not have been driving a motor vehicle. (Deposition testimony of Mark Byrd, appended to District Court Docket No. 32).

A Carlisle police officer testified to his knowledge that state government would not do anything about Byrd without a report from somebody like the Carlisle police. (Deposition testimony of Roy Fryman, appended to District Court Docket No. 32).

Although Carlisle police knew of Byrd's numerous accidents caused by his epilepsy, the police did nothing. Carlisle police did not make reports of many accidents, the Kentucky State Police have no copies of accident reports other than the accident with petitioner, and Byrd was never given uniform citations or traffic tickets as a result of his dangerous driving. Byrd's operator's license was finally revoked on August 27, 1991, after the Medical Review Board was notified by an attorney. (Deposition testimony of Valerie Taylor, p. 25-26, District Court Docket No. 20a).

Carlisle maintains a policy of refusing to take action to remove impaired operators of motor vehicles from the highway. Carlisle's mayor testified that if Carlisle police know of Byrd's history of epilepsy-related accidents, they should continue to let him drive, "as long as he has a license." (Deposition testimony of Frank Hughes, appended to District Court Docket No. 32). When questioned concerning the existence of a municipal policy of allowing impaired individuals to operator motor vehicles, the mayor stated,

> Well, we have had older people and still got older people right here right today that in my opinion, I don't know, maybe they are not capable of driving but they drive everyday. And if you were going to take their license away from them they are going to die.

Deposition testimony of Frank Hughes, appended to District Court Docket No. 32.

Carlisle police have never sought to revoke the operator's license of any driver. (District Court Docket No. 29).

Further, Carlisle has no training for its police. (Deposition testimony of Frank Hughes, appended to District Court Docket No. 32).

The district court dismissed petitioner's complaint on a Rule 12(b)(6) motion (1) because there was no evidence of a "special relationship" between Carlisle and Byrd or between Carlisle and Jones, (2) because *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989) required dismissal as Carlisle is not obligated to protect Jones, and (3) because Carlisle's actions cannot be said to be a legal cause of Jones' injuries. The district court also stated, "The most that can be said of the relation between Byrd and the City of Carlisle is that the Carlisle Police purposefully allowed Byrd to continue operating a motor vehicle." The district court also stated, "[t]he State has no duties to members of the general public who are injured as a result of action by third parties, even when the State indirectly facilitated those actions."

On appeal to the United States Court of Appeals for the Sixth Circuit, the district court ruling was affirmed. In affirming, the Sixth Circuit employed a "special relationship" analysis. Relying upon *DeShaney, Martinez v. California*, 444 U.S. 277 (1980) and on *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986), the Court stated, "Byrd was not acting as the agent of the City, nor was there a special relationship between the City and Byrd or between City and Mr. Jones." The Sixth Circuit noted petitioner had alleged liability under a failure to train claim as per *Canton v. Harris*, 489 U.S. 378 (1989), but this theory was rejected on the basis that,

> While the City did nothing to prevent Byrd from driving, this inaction was not the "moving force" behind Mr. Jones' injuries. His injuries were directly caused by the epileptic seizure Byrd experienced while he was operating his vehicle.

In holding that *DeShaney* requires a special relationship before a state incurs Section 1983 liability for injury inflicted by a private actor, the Sixth Circuit does not define what a special relationship is. Petitioners believe the Sixth Circuit reads *DeShaney* to require a custodial relationship; that is, prisoners or patients, before liability can attach.

The Sixth Circuit noted that Jones had alleged a theory of recovery based upon a claimed entitlement to enforcement of state laws, but this theory was rejected, being termed nothing more than a "failure to protect" claim which is barred by *DeShaney* because states do not have an affirmative obligation to protect private individuals from the conduct of other private citizens.

Jones' complaint in addition to specifying state law enforcement responsibilities of Carlisle, alleged Carlisle's conduct to be deliberate and conscious as well as reckless, wanton, and gross. Jones specifically alleged that Carlisle's conduct was abusive. It was alleged that Carlisle consciously decided not to enforce the laws of Kentucky against Byrd, and this in fact encouraged Byrd to continue to operate a motor vehicle. Jones also alleged that Carlisle's policies amount to a deliberate indifference to the constitutional rights of persons such as Jones and cause Carlisle police to be inadequate to the task to be performed by them.

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the Sixth Circuit has decided an important question of federal law in a way that conflicts with applicable decisions of this Court. Also, the United States Court of Appeals for the Sixth Circuit has rendered a decision herein which conflicts with decisions of other United States Courts of Appeals.

IMPORTANT QUESTION OF FEDERAL LAW DECIDED BY SIXTH CIRCUIT WHICH IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner submits there is no place for a "special relationship" analysis in Section 1983 jurisprudence.

The only occasion on which this Court has addressed the "special relationship" concept is *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989), and in that case, the "special relationship" theory of liability was flatly rejected. As will be discussed subsequently, the "special relationship" analysis employed by the Sixth Circuit in the instant case is substantially different from the "special relationship" analysis advanced in *DeShaney*. It is an anomaly that the Sixth Circuit's "special relationship" analysis relies upon *DeShaney* for its support.

DeShaney was a Section 1983 claim brought on behalf of a minor, Joshua DeShaney, against state child welfare officials who, although having ample reason to believe that Joshua was being abused by his father, did nothing to protect Joshua until such time as his father had already left Joshua permanently brain damaged as a result of repeated assaults.

DeShaney arose in the Seventh Circuit which was presented with a claim that because of a "special relationship"

between Joshua and the state actors, the state became obligated to protect Joshua in a reasonable fashion. The Seventh Circuit rejected the "special relationship" analysis, saying, "We can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship.'" *DeShaney v. Winnebago, Cty. Dept. of Soc. Services*, 812 F.2d 298, 303 (7th Cir. 1987). However, the Third and Fourth Circuits had indicated approval of a special relationship analysis, *DeShaney*, *Id.* at U.S. 194, and so the petition for certiorari was granted. Hence, *DeShaney* presented this Court with the direct question of whether a special relationship analysis was appropriate. This Court responded to the contention by saying, "We reject this argument." *DeShaney*, *Id.* at 198.

In footnote four at 489 U.S. 197, this Court explains that the notion of special relationship appears to have come from a statement in *Martinez v. California*, 444 U.S. 277 (1980), dealing with alleged Section 1983 liability of a state parole board which had paroled a prisoner who later murdered a young girl. In *DeShaney*, it was noted that the special relationship concept appears to have come from a statement in *Martinez* that "[t]he parole board was not aware that appellant's decedent, as distinguished for the public at large, faced any special danger." *Martinez*, *Id.* at 285. This Court emphasized its rejection of special relationship by stating that *Martinez* was decided on the narrow ground that the causal connection between the decision to grant parole and the subsequent murder was too attenuated and remote to allow liability.

DeShaney does go on to state circumstances in which the state is obligated to protect those persons whose freedom has been restrained by the state; that is, prisoners and mental

patients. However, this duty to protect does not arise from a special relationship but, instead, arises from the fact that a state's limitation on that individual's freedom prevents the individual from protecting himself. *DeShaney*, *Id.* at 199-200.

Often overlooked in *DeShaney* is the fact that petitioner *conceded* the state played no part in creating the danger of child abuse. *Id.* at 197, 201. In other words, the state placed Joshua in no worse position than that in which he would have been had the state not acted at all. *Id.* at U.S. 201.

Petitioners submit the true holding of *DeShaney* is that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process clause assuming that the state played no role in increasing the danger of private violence.

The Sixth Circuit employs a special relationship analysis with a twist. Although this Court specifically rejected such analysis in *DeShaney* where it was used in an attempt to prove liability, the Sixth Circuit requires a "special relationship" analysis as a prerequisite for liability. Strangely, the Sixth Circuit reads *DeShaney* to say that this Court found that no special relationship existed between Joshua and the defendant agency or between the abusive father and the agency, and this Court, therefore, affirmed the dismissal of the Section 1983 action on those grounds. With this reading of *DeShaney* as a starting point, the Sixth Circuit goes on to hold that because there was no special relationship, there can be no Section 1983 liability. The Sixth Circuit arrives at this conclusion without questioning the district court's statements that Carlisle Police "purposefully allowed Byrd to continue operating a motor vehicle" and "the State indirectly facilitated those actions" (Byrd's operation of a motor vehicle with a seizure disorder).

The theoretical underpinning of *DeShaney* is the concept that the Constitution safeguards only negative, not positive, liberties. This concept is mentioned in the body of the opinion, *Id.* at U.S. 196-197 and is expounded upon in the dissent of Justice Brennan joined by Justices Marshall and Blackmun.

Jones contends he presents a valid Section 1983 claim because Carlisle's policies are affirmative acts which caused his injury. A municipality, having law enforcement responsibilities, which refuses to enforce the law therefore abuses the law and gives rise to a substantive Due Process violation for which Section 1983 redress is available to Petitioner. Alternatively, Carlisle's policy of no training for its police is a deliberate indifference actionable under *Canton v. Harris, supra.*

Of course, *DeShaney* is the law and should be followed. However, the scope of *DeShaney* is unclear especially in light of the fact that the petitioner in *DeShaney* conceded that the state did nothing to create the danger of child abuse to the petitioner. It is a significant difference in the instant case that the facts fairly can be said to show that Carlisle "purposely allowed" and "indirectly facilitated" the operation of an automobile by an uncontrolled epileptic. Petitioner herein contends the Constitution does protect him from abusive and arbitrary actions by state law enforcement in adopting policies of refusing to enforce laws, thereby depriving him of his "liberty" interests guaranteed by the Fourteen Amendment. However, this point has never been addressed in the instant proceedings because of the court-imposed requirement of special relationship, not found in either Section 1983 or in the cases decided by this Court.

42 U.S.C. Section 1983 states that every person who, under color of law, subjects a citizen of the United States to a deprivation of constitutional rights shall be liable to the party injured. Notably, nothing is said about a special relationship.

To read a special relationship requirement into Section 1983, which has no such requirement, violates the rule that Section 1983 should be liberally construed because it is a remedial statute. In *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court quoted from Congressional debates concerning the passage of Section 1983,

> The act is remedial, and an aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedy for their wrongs to all the people. . . .

Monell, *Id.* at 684.

When Carlisle adopted a policy of refusing to enforce the law concerning the operation of motor vehicles by impaired drivers, Carlisle abused the law. It is this abuse which gives rise to the constitutional tort. This is the teaching of *DeShaney*, *Id.* at U.S. 196, which is in accord with the earlier case of *Monroe v. Pape*, 365 U.S. 167 (1961), in which it is said,

> The question with which we now deal is the narrower one of whether Congress in enacting Section 1979 (now 42 U.S.C. Section 1983), meant to give a remedy to parties deprived of Constitutional rights, privileges, and immunities by an official's abuse of his position. (citations omitted) *We conclude that it did so intend.*
>
> * * * * * * * * * * * * *
>
> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, *state laws might not be enforced* and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe, *Id.* at 172 and 180, parenthetical statements and emphasis supplied.

This Court previously has ruled that issues of whether state action causes a constitutional deprivation should be determined by principles of common law tort liability.

> Section 1979 (now 42 U.S.C. Section 1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Monroe, *Id.* at 187, parenthetical statement supplied.

Common law tort principles of intervening and superseding causes make it clear that Carlisle caused Jones' injury. "Special relationship" is not a principle of common law tort liability. Instead, it is an artificial, result-oriented standard manufactured by a desire for a simple solution to

the complex issues presented by Section 1983. Not only has special relationship never been defined, petitioners submit that it is not capable of a rational definition.

Jones submits that the correct analysis in evaluating his claim is found in the concurring opinion of Justice Stevens in *Daniels v. Williams*, 474 U.S. 327 (1986) at 336-343. Petitioner Jones asserts a "substantive due process claim" under the Due Process Clause of the Fourteenth Amendment. By this he means that there are certain arbitrary government actions, such as consciously deciding not to enforce state law, which are barred regardless of the procedures used to implement those actions. Petitioner claims a constitutional right of body security of which he has been deprived by Carlisle. It is petitioner's belief that the analysis proposed by Justice Stevens in his separate opinion in *Daniels* has been followed by this Court in *Collins v. City of Harker Heights, Tex.*, ____ U.S. ____ , 112 S.Ct. 1061 (1992) in which Justice Stevens writes for an unanimous court. Although liability was not found in *Collins*, that opinion certainly implies that municipal policies which can be characterized as arbitrary or conscience shocking in a constitutional sense will give rise to Section 1983 liability.

CONFLICT AMONG CIRCUITS

Petitioners submit the law of the various United States Courts of Appeals is in conflict concerning the question of whether a special relationship is necessary before Section 1983 liability can be incurred.

SIXTH CIRCUIT

In the instant case, the Sixth Circuit relies upon *DeShaney*, *Martinez* and on its own case of *Janan v. Trammell*,

supra., (another case alleging liability against a parole board for paroling a prisoner who later committed murder), in ruling that a special relationship is necessary before Section 1983 liability can be incurred. By this, the Sixth Circuit means that unless there is a special relationship between the private individual directly causing injury and the state or a special relationship between the victim and the state, there cannot be Section 1983 liability. The Sixth Circuit never defines what is the special relationship between the victim and the state, but the Sixth Circuit indicates that the special relationship between the victim and the state must be such that state action has placed the victim, as distinguished from the public at large, in special danger from the private actor. *Janan*, *Id*. at 560.

This holding of no liability would be true even though the state's actions caused the constitutional injury. In *Nishiyama v. Dickson County*, Tenn., 814 F.2d 277 (6th Cir. 1987) it is stated,

> In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to be aware of it, and of a magnitude such that it is highly probable that harm will follow.

Nishiyama, *Id*. at 282.

The Sixth Circuit found Section 1983 liability to exist in *Nishiyama* because Dickson County was in a special relationship with its prisoner to whom the county furnished a patrol car for his private use and who used the patrol car to stop an innocent motorist and murder her.

Nishiyama and the instant case can be read together for the proposition that even though a state actor does some-

thing that can be a legal cause of a constitutional deprivation, there is no liability absent a special relationship, probably custodial in nature, between the state and the constitutional tortfeasor or unless a state act subjects the particular victim to a danger not encountered by the public at large. The Sixth Circuit appears to say that liability can be incurred only by harming those in custody, prisoners and patients. Also, a state policy which injures unidentified members of the public at large is not actionable. Moreover, the lack of a special relationship in the Sixth Circuit not only prevents a due process violation from occurring, but it also forecloses any claim that state policy caused a constitutional deprivation because of a failure to train as per *Canton v. Harris*, 489 U.S. 378 (1989).

There is no support for the Sixth Circuit's interpretation either in the language of Section 1983 or in any decision of this Court.

D.C. CIRCUIT

The D.C. Circuit seems to require a special relationship before a state actor can incur liability for injury inflicted upon a victim, although no definition of special relationship is given. *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C. Cir. 1991).

FIRST CIRCUIT

The First Circuit requires a special relationship meaning some kind of involuntary state commitment of the victim even if the state acts with deliberate indifference to the victim's needs. *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 993 (1st Cir. 1992).

SECOND CIRCUIT

The Second Circuit does not seem to require a special relationship in order for a state to be liable for a constitutional deprivation committed by a private actor. If the state actor assisted in creating or increasing the danger to the victim, then there is liability. *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993). The petitioner believes this is the correct view.

THIRD CIRCUIT

The Third Circuit appears to require a state to have a custodial relationship with the victim before the state will be responsible for injury inflicted by a private citizen. In *Brown v. Grabowski*, 922 F.2d 1097 (3rd Cir. 1990), police were not responsible for the murder of a female by her boyfriend even though New Jersey law required the police to inform the victim of her right to file a complaint based upon domestic violence and even though the police department was completely unsupervised and not complying with the state domestic violence law. A custodial relationship was necessary between the state and the victim. In *D.R. By L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992), school officials were not liable for extended sexual abuse of high school students by other students because there was no custodial relationship; that is, special relation, between the school officials and the abused children. See, also, *Black by Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993).

FOURTH CIRCUIT

Piechowicz v. U.S., 885 F.2d 1207 (4th Cir. 1989) at page 1215 interprets *DeShaney* to hold that substantive due pro-

cess only protects the liberty interests of persons affirmatively restrained.

FIFTH CIRCUIT

The Fifth Circuit takes a mixed position in holding that *DeShaney* does not require police to arrest law breakers, and, therefore, there is no constitutional violation in such a situation. *McKee v. City of Rockwall, Tex.*, 877 F.2d 409 (5th Cir. 1989). The Fifth Circuit would hold that a special relationship exists between school officials and students so as to allow Section 1983 liability when students are sexually molested by their teacher and the supervisors have sufficient reason to know of this. This is because the school relation is a "special relation." *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992). However, in *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), the Fifth Circuit holds that even though inaction usually will not implicate Due Process guarantees, Section 1983 liability can be incurred when the state does something to create danger of violence accompanied by conduct showing a state of mind indicative of an abuse of power shocking the conscience.

SEVENTH CIRCUIT

The Seventh Circuit denies a doctrine of special relationship in constitutional law. *DeShaney v. Winnebago Cty. Dept. of Soc. Services*, 812 F.2d 298 (7th Cir. 1987).

In *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), the Seventh Circuit held a municipality could incur Section 1983 liability for inadequate procedures in failing to recover a deadly weapon from a suspended, mentally ill police officer who shoots and kills a neighbor even though the officer was not acting under the color of state law at the time

of the shooting. The *Gibson* court shows how the result is consistent with *DeShaney* in the footnote appearing at 910 F. 2d 1521-1522.

The Seventh Circuit recognizes that the key to Section 1983 liability in situations involving private individuals as well as state actors is to control governmental abuse of power; *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991); and to guard against excesses of governmental power; *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991). The Seventh Circuit realizes that *DeShaney* simply holds that a mere failure to protect a private person from injury by another is not actionable.

The Seventh Circuit also holds that state child welfare officials can incur Section 1983 liability for placing children in foster homes of persons known to be incompetent and abusive and who in fact abuse the children. *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). This is because in such situations, the state action does the harm even though the abuse is inflicted by other persons. *K.H. Through Murphy*, Id. at 848-849.

EIGHTH CIRCUIT

The Eighth Circuit states that there is no Section 1983 liability unless there is a custodial relationship or unless a state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992).

NINTH CIRCUIT

In the Ninth Circuit, state actors can incur liability by arresting a drunk driver and impounding his car, thereby

stranding the driver's female passenger in a high crime area where she was later raped. This is because the police put the female passenger in jeopardy. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Yet, police do not incur Section 1983 liability by failing to protect an individual from harassment and abuse by her former husband because *DeShaney* limited the circumstances giving rise to a special relationship, presumably custodial circumstances, and without this special relationship, there is no obligation. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990). The Ninth Circuit would recognize an exception to the general rule of no liability for failure to protect when the state affirmatively does something which creates a danger which places the plaintiff in danger. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

The Ninth Circuit therefore seems to have a mixed position by requiring a special relationship while at the same time recognizing liability when the state does something to create the danger to the victim.

TENTH CIRCUIT

The Tenth Circuit would not allow a plaintiff to recover under facts identical to those appearing in the Ninth Circuit case of *Wood v. Ostrander* because there is no constitutional right to personal security absent a custodial relationship. *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1520 (10th Cir. 1991). The case of *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) also holds that absent the custodial relationship, there is no constitutional duty to act.

ELEVENTH CIRCUIT

The Eleventh Circuit relies heavily on Sixth Circuit

precedent in holding that in order for Section 1983 liability to exist, there must be a special relationship between the state and the constitutional tortfeasor or there must be a showing that the victim, as opposed to the general public, faced a special danger. *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989).

Although this Court rejected and discouraged the use of a special relationship analysis in *DeShaney*, the *DeShaney* case has spawned a significant body of special relationship law in the Courts of Appeals. The decisions of the Courts of Appeals are in conflict concerning whether *DeShaney* requires a special relationship analysis, and if there is such a requirement, the Courts of Appeals differ on what the requirement is.

It seems clear that the Sixth Circuit on authority of *DeShaney*, requires a special relationship for Section 1983 liability to attach and this is true without regard to whether or not state action causes the constitutional harm to the victim. However, *DeShaney* only holds that a state has no Due Process obligation to protect its citizens against private violence. *DeShaney* does mention that a state has an obligation to protect private individuals in custodial situations where the state has affirmatively restrained the freedom of the private individual, meaning prisoners and mental patients, but the Sixth Circuit reads *DeShaney* to mean that a state is only obligated to protect its prisoners and patients and is not obligated to protect its citizens at large even though it fairly can be said that state action caused the injury. This is true even though state action "indirectly facilitates" and "purposefully allows" a victim to be harmed by a private individual.

The Sixth Circuit's view appears to be the same as the views of the D.C. Circuit, the First Circuit, the Third Circuit, the Fourth Circuit, the Eighth Circuit, the Tenth Circuit, and the Eleventh Circuit.

Contrary views are held by the Second and the Seventh Circuits. In these Circuits, the issue is not whether a special relationship exists, but, instead, the issue is whether the state actor assisted in creating or increasing the danger to the victim and whether the state action can be characterized as either an abuse of governmental power or an excess of governmental power.

Jones suggests that had this case arisen in the Seventh or Second Circuits, he would have survived the motion to dismiss and would have gone to trial.

The Fifth Circuit appears to straddle the divide by requiring and finding a special relationship in situations where school officials ignore sexual abuse of students and by noting that a lack of state action can implicate Due Process guarantees when the state does something to create the danger of violence in circumstances showing a state of mind indicative of an abuse of power which shocks the conscience.

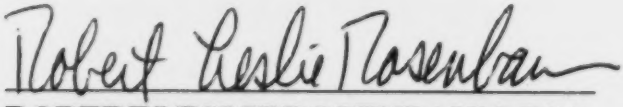
The Ninth Circuit has employed a special relationship analysis, but it also recognizes liability when the state causes the injury, albeit not by itself.

Jones asserts that abusive conduct by state actors such as a conscious refusal to enforce state law thereby causing deprivation of a liberty interest does give rise to Section 1983 liability. To find otherwise is to construe Section 1983 in a narrow and constricted manner and to ignore the plain language of Section 1983 which allows redress when a person acting under color of law causes a deprivation of a constitutional right.

Monroe, *Id.* at 180, clearly states that liability is incurred when by reason of neglect, state laws might not be enforced, and *Monroe*, *Id.* at 187, clearly states that Section 1983 "[s]hould be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should issue so as to affirm there is no place for a special relationship analysis in Section 1983 jurisprudence. This Court rejected the special relationship analysis in *DeShaney*. However, several Courts of Appeals read *DeShaney* to require a special relationship. The Petition should be granted in order to resolve this conflict and to reaffirm *DeShaney*.

Respectfully submitted,



ROBERT LESLIE ROSENBAUM, ESQ.
Counsel of Record for Petitioners
ROSENBAUM & ROSENBAUM, P.S.C.
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507-1289
(606) 259-1321

FRANK H. McCARTNEY, ESQ.
SUIT, McCARTNEY & PRICE
207 Court Square
Flemingsburg, Kentucky 41041
(606) 849-2338

APPENDIX

APPENDIX A

OPINIONS BELOW

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky; Preferred Risk Mutual Insurance Company; Mark Byrd,
No. 92-6103 (United States Court of Appeals for the Sixth Circuit, August 27, 1993) 3a-14a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky, et al.,
Civil Action No 91-516 (United States District Court Eastern District of Kentucky, June 12, 1992) 15a-29a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky, et al.,
Civil Action No 91-516 (United States District Court Eastern District of Kentucky, July 21, 1992) (Order denying Motion to Alter, Amend or Vacate)..... 31a-33a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky; Preferred Risk Mutual Insurance Company; Mark Byrd,
No 92-6103 (United States Court of Appeals for the Sixth Circuit, October 13, 1993) (Order denying Petition for Rehearing) 35a

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

NO. 92-6103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES RICKY JONES; VERA JONES,
Plaintiff-Appellants,

AIK SELECTIVE SELF INSURANCE FUND,
Intervening Plaintiff,

V.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

CITY OF CARLISLE, KENTUCKY; PREFERRED RISK MUTUAL INSURANCE COMPANY; MARK BYRD,
Defendants-Appellees.

Decided and Filed August 27, 1993

Before: GUY and SUHRHEINRICH, Circuit Judges; and DOWD, District Judge.*

---

*The Honorable David D. Dowd, Jr., United States District Judge for the Northern district of Ohio, sitting by designation.

DOWD, District Judge, delivered the opinion of the court.

I.

The appellants, James Ricky Jones (hereafter "Mr. Jones") and his wife Vera Jones (hereafter collectively "the Joneses") challenge the district court's dismissal of their action brought against the City of Carlisle, Kentucky (hereafter "the City") under 42 U.S.C. § 1983. The Joneses also challenge the district court's remand to state court of their claim against defendant Preferred Risk Mutual Insurance Company (hereafter "Preferred Risk") for declaratory relief.

The Joneses claim that the appellee City of Carlisle is liable pursuant to § 1983 for money damages for the physical injuries Mr. Jones suffered in the November 13, 1990 automobile accident cause by Mark Byrd (hereafter "Byrd"), a private citizen of Kentucky. The Joneses also seek a declaration from the court that they are entitled to $100,000 on Mr. Jones' underinsured motorist policy.

The Joneses allege that the City incurred § 1983 liability for Mr. Jones' injuries when it allowed Byrd, a known epileptic prone to uncontrollable seizures, to maintain a driver's license. The Joneses also challenge Preferred Risk's position that under the terms of the underinsured motorist policy, it does not incur liability until after the policy holder obtains a judgment against the tort-feasor and the tort-feasor's insurance is insufficient to cover the insured's judgment.[1]

The district court dismissed the § 1983 claim against the City for failure to state a cause of action under Fed. R. Civ. P.

---

[1]The Complaint also advanced several state tort claims against the City and Byrd.

12(b)(6). The district court found that Byrd was not acting as the agent of the City at the time of the accident, and that Mr. Jones, as distinguished from the public at large, was not placed in special danger as the result of the City's inaction and Byrd's continued activity. Further, the district court found that no special relationship existed between the City and Mr. Jones nor between Byrd and Mr. Jones which would impose upon the City a duty of care owed to Mr. Jones. The district court remanded the Joneses' declaratory judgment claim against Preferred Risk to Nicholas County, Kentucky.

II.

In evaluating the propriety of a dismissal under Rule 12(b)(6), this Court must "consider the pleadings and affidavits in a light most favorable to the plaintiff." *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981(1981) (citations omitted). Further, the factual allegations in the complaint must be treated as true. *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). To withstand a challenge under Rule 12(b)(6), it must be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[2]

---

[2] The Joneses argue that the summary judgment standard identified in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), represents the applicable standard of review for the present case because certain depositions were submitted by them with their Response Brief. However, the Motions to Dismiss were not transformed into summary judgment motions because the district court specifically stated that it was granting a Rule 12(b)(6) dismissal and it is apparent from the decision that the district court did not rely on the outside evidence submitted in rendering its decision. *Atkins v. Louisville and Nashville R. Co.*, 819 F.2d 644 (6th Cir. 1987). *See, e.g., Friedman v. United States*, 927 F. 2d 259 (6th Cir. 1991).

The complaint alleges that Mark Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since birth. In 1983, Kentucky issued Byrd a driver's license. Between 1983 and 1987, Byrd was involved in at least seven automobile accidents in the City of Carlisle. Each accident was allegedly caused by Byrd experiencing a seizure while driving, and each accident resulted in either property damage, personal injury, or both. The City police investigated each accident; however, no accident report was ever filed. No citation was ever issued and no law enforcement action was ever taken against Byrd.

In the accident involving Mr. Jones, Byrd, as in his other accidents, was operating a motor vehicle when he experienced an epileptic seizure. He lost control of his vehicle, crossed over the center line into the oncoming lane of traffic, and struck head-on the motor vehicle operated by Mr. Jones, who was severely and permanently injured. Byrd was never cited and no law enforcement action was taken against him as a result of this accident.

A. Section 1983 Analysis

The Joneses bring the present lawsuit claiming that the City was aware that Byrd presented a danger to motorists but took no action to revoke his driver's license. Under Kentucky statutes, law enforcement officials are required to file with the Department of State Police a written report of any motor vehicle accident resulting in personal injury or property damage. Ky. Rev. Stat. § 189.635(3). This report must also be submitted to the Kentucky State Police. Ky. Rev. Stat. § 189.635. Further, Kentucky will suspend the license of a driver upon notice from law enforcement officials that the driver is subject to epileptic seizures. 601 Ky. Admin. Regs. 13:010.

The Joneses advance three claims under 42 U.S.C. § 1983 against the City. First, they claim that it was the policy of the City both to fail to report accidents involving individuals suffering from epileptic seizures and to allow Byrd, a known epileptic prone to seizures, to maintain a driver's license and operate a motor vehicle. Second, the Joneses claim that the City's failure to train and supervise its police has caused the City Police to be inadequate to the tasks performed by them, especially as concerns the duty of the police officer as regards unfit and unsafe operators of motor vehicles. This failure to train, the Joneses allege, also results in §1983 liability attaching to the City. Third, the Joneses claim that Mr. Jones, as a citizen of the United States and of Kentucky, is entitled to the protection of the laws of both, and that the City's actions, policies, or customs deprived Mr. Jones of this entitlement. The Joneses argue that, absent these policies, individual officers would have reported the prior accidents as required under state law, Byrd's license would have been revoked, and the accident involving Mr. Jones would never have occurred.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall...deprive any person of life, liberty, or property, without due process of law." However, the Due Process Clause does not "protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Soc. Serv. Dept.*, 489 U.S. 189, 195 (1988).

In *DeShaney*, a mother and her son brought suit against a county agency claiming that it was responsible for the brutal beating the son received at the hands of his father.

After a divorce, the court had awarded custody of the boy to his father. On numerous occasions, the boy was brought to the emergency room with injuries that suggested child abuse. Further, the defendant agency was made aware of these suspicious injuries. Nonetheless, the agency took no steps to protect the boy from his abusive father. The child was eventually beaten so severely by his father that he suffered permanent brain damage.

The Court held that the defendant agency did not violate the son's due process rights because the boy's injuries were caused by a private actor, and that the agency had no control over the father. The Court noted that the agency did not cause the injuries and there was no special relationship between the boy and the agency or between the father and the agency which would trigger an obligation to take affirmative action to prevent future abuse. According to the *DeShaney* Court, the fact that the defendant agency was aware of the potential danger was not sufficient to impose a duty to act.

In the earlier case of *Martinez v. California*, 444 U.S. 277 (1980), the Court held that the state officials were not liable when a parolee murdered a fifteen year old girl. The Court found that the officials did not cause the crime, that the parolee was not acting as an agent of the state, and that the victim did not face any special danger apart from the rest of society.

The Sixth Circuit has also applied the analysis employed in *DeShaney*. In *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986), a case filed two years prior to *DeShaney*, a boy was murdered by a parolee. The boy's family brought suit against the Parole Board claiming that it was aware of the parolee's dangerous propensities and had a duty to protect society from him. The court held for the Parole Board, finding no

duty to protect the victim from the parolee. The court first noted that the parolee was not a state officer acting under color of state law. The court then announced the rule to be applied in the Sixth Circuit regarding injuries suffered and damages incurred at the hands of private actors:

> [T]he proper analysis is whether a special relationship exists between the criminal and the victim or between the victim and the state or whether there is some showing that the victim, as distinguished from the public at large, faces a special danger by the parolee's release. In so holding, we follow other circuits that have held that absent a special relationship between the criminal and the victim or the victim and the state, no due process violation can occur.

Id. at 560 (citations omitted). See also *Cornelius v. Town of Highland Lake,* ALA, 880 F.2d 348 (11th Cir. 1989).[3]

A due process violation was found in *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), where a county prisoner was entrusted with a patrol car for his private use, absent any supervision. While driving the police car, the prisoner used the flashing blue light to pull over the

---

[3] Here the city was liable for violating a city clerk's due process rights when it initiated a work program where prisoners performed manual labor around the City Hall grounds. On one particular day, the city clerk was abducted by two of the prisoners working on City Hall grounds who were not eligible for work release, but were accidentally allowed to participate. The court held that there was a special relationship between the city clerk and the city as she was obligated to work in the same area where the city had determined it would initiate the prisoner work program. The court also found a special custodial relationship between the city and the prisoners. Further, the court found that the plaintiff clerk faced a special danger separate from the remainder of the community because she was constantly in contact with the prisoners from the work program.

decedent's car and then beat her to death. At trial, it was determined that it was the policy of the Sheriff's Department to allow the prisoner to drive the car unsupervised. It was also determined that the Sheriff was aware that the prisoner had been using the patrol car to pull motorists off the road for several hours before the victim was killed but did nothing to stop this conduct.

The court found a special relationship between the defendant Sheriff's Department and the prisoner, as the prisoner was being held in custody, albeit with substantial privileges. Further, the court noted that, unlike *Martinez and Janan*, the defendants put into motion the actions which eventually caused the victim's death. The court observed that "the officers gave [the prisoner] the car and the freedom to commit the crime." *Id.* at 281 (emphasis in original).

Unlike the defendant in *Nishiyama*, the City of Carlisle did not cause plaintiff's injuries; the injuries were caused by Byrd, a private individual. Byrd was not acting as the agent of the City, nor was there a special relationship between the City and Byrd or between the City and Mr. Jones.[4] Further, while Byrd was a definite danger behind the wheel of a motor vehicle, he was no more a danger to Mr. Jones than to any other citizen on the City streets. Finding that the Joneses

---

[4] The Joneses argue that *DeShaney* does not impose upon the claimant the showing of a special relationship between the City and the tort-feasor or the City and the claimant. We read *DeShaney* to hold that in some circumstances the Constitution imposes upon the State an affirmative duty of care and protection based upon the relationships between the State and the parties. However, the *DeShaney* Court specifically found that no special relationship existed between DeShaney and the defendant agency or between the abusive father and the agency, and affirmed the dismissal of the petitioners' § 1983 action on those grounds.

have failed to establish a special relationship required to invoke the due process protection of the Fourteenth Amendment, the district court was correct in granting the City's motion to dismiss the Joneses' § 1983 claim based on an alleged policy of not submitting accident reports in cases involving epileptic seizures.

In support of their claim of failure to train, the Joneses cite *Canton v. Harris*, 489 U.S. 378 (1989). In *Harris*, police officers failed to provide the plaintiff with medical attention once she was taken into custody. The Court found a due process violation because of the special relationship that the plaintiff and the city had based upon the custody of the plaintiff. However, the Court noted that "a municipality can be liable under § 1983 [for a failure to train] only where its policies are the 'moving force [behind] the constitutional violation.'" *Id.* at 389 (citation omitted).

As the district court held, the Joneses' reliance on *Harris* is misplaced. It is true that the Supreme Court in *Harris* held that a municipality may be liable under § 1983 for failure to train or supervise law enforcement officials where such failure constitutes "deliberate indifference" to the rights of an individual. However, the analysis of a §1983 failure to train claim does not stop there. As the *Harris* Court noted, to prevail, a §1983 plaintiff must demonstrate that the policy "actually cause[d] injury." *Id.* at 390. In *Harris*, the plaintiff suffered injury at the hands of a state actor. In contrast, Mr. Jones' injuries were caused by a private actor. While the City did nothing to prevent Byrd from driving, this inaction was not the "moving force" behind Mr. Jones' injuries. His injuries were directly caused by the epileptic seizure Byrd experienced while he was operating his vehicle. As a result, the Joneses' § 1983 claim of failure to train or supervise was appropriately dismissed by the district court.

The district court also appropriately dismissed the Joneses' "entitlement" claim against the City. This claim that Mr. Jones was entitled to the protection of the laws of the United States and Kentucky represents nothing more than a "failure to protect" claim under the Fourteenth Amendment. As previously noted, the *DeShaney* Court definitively held that while the Due Process Clause of the Fourteenth Amendment prevents a State from depriving individuals of life, liberty, or property without due process of law, it does not impose upon the State an affirmative obligation to protect private individuals from the conduct of other private citizens. *DeShaney, supra* at 195.

As the *DeShaney* Court observed, this type of § 1983 analysis often renders harsh results, especially when innocent individuals suffer injuries while local governments stand idly by. *DeShaney, supra* at 203. However, this Court, like the *DeShaney* Court, is unable to extend the reach of the Due Process Clause of the Fourteenth Amendment to cover common law tort actions between private citizens.

B. Declaratory Judgment Analysis

The Joneses also challenge the district court's decision to remand their declaratory judgment action against Preferred Risk to Nicholas County. In remanding to state court, the district court noted that it has discretion determining whether to hear an action for declaratory relief. 28 U.S.C. § 2201. *Grand Trunk W. R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir. 1984).

The Joneses do not challenge the district court's remand of their action for declaratory judgment, recognizing the court's discretion. *Allstate Ins. Co. v. Mercier*, 913 F.2d 273 (6th Cir. 1990). However, the Joneses contend that the

district court failed to consider their second cause of action against Preferred Risk, that being a diversity action for money damages, arguing that a federal district court should not refuse to hear a claim where the elements of diversity jurisdiction have been met. *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943).

A review of the Complaint reveals that the Joneses did not plead a cause of action against Preferred Risk separate and apart from their declaratory judgment claim. While the Complaint makes reference to the $100,000 insurance the Joneses allege they are entitled to, the prayer merely seeks a declaration that they are entitled to that amount. The reference to the specific amount of $100,000 is made merely to define the content of the declaration.

The argument that the Joneses advanced two separate causes of action against Preferred Risk is further belied by the Joneses' postjudgment Motion to Alter, Amend, or Vacate filed with the district court, (Docket Nos. 46, 47). In addition to objecting to the dismissal of the §1983 claim against the City, the Joneses challenged the remand of the declaratory judgment claim without indicating to the district court that their complaint could be construed to include a diversity action against Preferred Risk separate and apart from their declaratory judgment claim.[5]

---

[5] The Joneses filed a supplemental motion in which they identified a recent Kentucky Supreme Court decision which expanded the rights of insureds to obtain underinsured motorist coverage in the event that they settle with the tort-feasor. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). The *Coots* decision has no bearing on the present action as the claim for damages was never before the district court.

The declaratory judgment action against Preferred Risk was originally filed in district court. It was consequently improper for the district court to remand it to a state court. Therefore, the Joneses' declaratory judgment action is remanded to the district court for entry of an order of dismissal without prejudice.[6]

III.

For the reasons stated above, the judgment of the district court is AFFIRMED IN PART and REMANDED IN PART for entry of an order consistent with this opinion.

---

[6] This Court observes that having disposed of the federal claims, it was also within the district court's discretion to dismiss the remaining pendent state claims against Byrd and the City. Pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Eastern District of Kentucky
FILED JUN 12 1992
at Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES, PLAINTIFFS,

AND

AIK SELECTIVE
SELF INSURANCE, INTERVENING PLAINTIFF,

VS.

CITY OF CARLISLE,
KENTUCKY, et. al., DEFENDANTS.

MEMORANDUM OPINION AND ORDER

In November of 1990, a vehicle being operated by defendant Mark Byrd crossed the center line and collided head-on with a vehicle being operated by plaintiff James Jones, who was seriously and permanently injured. The accident was apparently caused because Byrd experienced a seizure while driving which resulted in Byrd losing control of the vehicle and crossing over the center line. Byrd is an epileptic who is subject to uncontrolled seizures. Allegedly, since 1983, Byrd has been involved in seven automobile accidents in the City of Carlisle and in Nicholas County, all of which resulted in some sort of property damage or personal injury, and all of

which were caused by the fact that Byrd experienced an epileptic seizure while driving. Normally, under 601 Kentucky Administrative Regulations 13:010, the Commonwealth of Kentucky will suspend the license of a driver upon notice from law enforcement officials that the driver is subject to epileptic seizures. However, Byrd's license was never suspended and was valid at the time of the accident that is the subject of this suit. Plaintiffs allege that the Commonwealth was not properly informed of Byrd's epileptic condition because, though the Carlisle Police Department knew of Byrd's many accidents, he was never issued a citation and only on one occasion was a police report filed. Further, plaintiffs allege that it was the deliberate policy of the Carlisle Police Department not to report all of Mark Byrd's motor vehicles accidents[1] and to allow Byrd to operate a motor vehicle even though it was known that Byrd was an unsafe driver. Plaintiffs conclude that these actions by the Carlisle Police Department constitute a deprivation of the liberty of James Jones without due process of law in violation of the Fourteenth Amendment.[2]

---

[1] Under K.R.S. § 189.635, police officers are required to file written reports of motor vehicle accidents which render any vehicle inoperable or cause personal injury.

[2] Plaintiffs have filed a motion to amend their complaint in order to allege that the City also violated James Jones' rights under the Fifth Amendment. However, the Fifth Amendment is not directed to the states or state entities, but solely to the federal government. *Palko v. Connecticut*, 302 U.S. 319, 322, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Thus, a Fifth Amendment due process claim adds nothing to a plaintiff's Fourteenth Amendment due process claim against a state entity. See *Popow v. City of Margate*, 476 F. Supp. 1237, 1242 n. 2 (D.N.J. 1979); *Flowers v. Webb*, 575 F. Supp. 1450, 1456-1457 (E.D.N.Y. 1983). For this reason, the motion to amend the complaint will be denied.

Plaintiff James Jones has brought this action pursuant to 42 U.S.C. § 1983 against the City of Carlisle, and seeks damages for the City's alleged deprivation of his constitutional rights. Plaintiff Vera Jones, the wife of James, seeks recovery against the City for loss of consortium. Also, plaintiffs have advanced pendent tort claims against the City and against defendant Byrd.

Defendant Preferred Risk Mutual Insurance Co. (Risk Mutual) sold underinsured motorist coverage to the plaintiffs prior to the accident. Byrd's automobile liability insurance is allegedly insufficient to compensate the plaintiffs for their losses. Plaintiffs seek a declaration of Risk Mutual's liability to them for the full amount of their underinsured motorist coverage, which plaintiffs allege is $100,000.00 per person. Risk Mutual acknowledges coverage, but claims that the liability limit on the underinsured motorist coverage provided to plaintiffs is $50,000.00. Therefore Risk Mutual has filed a counterclaim against plaintiffs seeking a declaration that the limit is $50,000.00

AIK Selective Self Insurance Fund (AIK) has been allowed to intervene as a third party plaintiff in order to assert claims against the City of Carlisle and Byrd. According to the intervening complaint, plaintiff James Jones was acting in the scope of his employment with Baumann Paper Company (not a party in this suit) when Byrd collided with him. AIK is the workers' compensation insurance carrier for Baumann Paper Company and has paid temporary total disability benefits to James Jones and will allegedly incur further expense in the future. In the event that Byrd and/or the City of Carlisle are found liable in this case, AIK seeks to recover the amount of indemnity paid and owing on behalf of James Jones.

The City of Carlisle has filed a crossclaim against Byrd, and Risk Mutual has filed crossclaims against Byrd and the City. Both the City and Risk Mutual seek judgment against their respective crossclaim defendants in the amount of any judgment which may be rendered against them in favor of the plaintiffs.

It should also be noted that in February of 1991 (nine months before the initiation of the present action, which was filed in November of 1991), plaintiff filed a suit in Nicholas Circuit Court against Byrd and Risk Mutual. In November of 1991 (at the same time the present suit was filed), the state complaint was amended to add the City of Carlisle as a defendant. The allegations in the Nicholas Circuit Court are essentially identical to the allegations made in this Court.

This matter is currently before the Court on several motions. The motion of the City to dismiss the complaint will be first addressed.

The City of Carlisle argues that where a plaintiff was deprived of liberty by an independent actor who has no special connection the State,[3] it cannot be said that the State violated the Fourteenth Amendment. It is undisputed that Byrd was in no way affiliated with a state entity, and that Byrd was the most proximate cause of the plaintiffs' injuries. The City thus concludes that since a § 1983 action is predicated on some deprivation of constitutional rights by a State entity[4], plaintiffs' § 1983 claims must be dismissed. To

---

[3] The term "State" refers generally to state and local governmental entities and their agents who are prohibited under the Fourteenth Amendment from depriving a person of liberty without due process of law.

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

support this conclusion, the City has cited several cases that merit examination.

In *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481(1980), a convicted rapist was paroled by the State of California, contrary to the direction of the sentencing court, which recommended that he should not be paroled. Five months after his release, the parolee murdered a young girl. The girl's survivors brought a § 1983 action claiming that the California officials responsible for the parole-release decision deprived the girl of her life in violation of the Due Process Clause of the Fourteenth Amendment. Though it was accepted that the officials knew or should have known that the release of the parolee would create a clear and present danger that the parolee would commit a violent crime, the Supreme Court affirmed the trial court's dismissal of the case. In reaching this conclusion it was recognized that the Due Process Clause of the Fourteenth Amendment protects a person only from deprivation by the *"State* . . . of life . . . without due process of law." *Id.* at 284 (emphasis in original). The Court concluded that the crime of the parolee, committed after his release, could not be characterized as State action and thus, California could not be held liable for the girl's murder. *Id.* at 285. Even if the parole board was negligent or wanton in allowing the release of the rapist, the action by the parolee after his release "cannot be fairly characterized as state action." *Id.*

This approach to §1983 claims based on injury caused by a private third party was expanded upon by the Sixth Circuit in *Janan v. Trammell*, 785 F. 2d 557 (6th Cir. 1986). A convicted armed robber was paroled by the Tennessee State Parole Board and two months later murdered Janan. Janan's family sued the Parole Board in a § 1983 action alleging gross negligence. The Sixth Circuit held that a §

1983 action could be maintained against the State for injuries caused by a private third party if "a special relationship exists between the criminal and the victim or between the victim and the state or whether there is some showing that the victim, as distinguished from the public at large, faces a special danger by the [State action]." *Id.* at 560. However, absent such special relationship, "no due process violation can occur," such that unless the State places a person in special danger, "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Id.* citing *Bowers v. DeVito*, 686 F. 2d 616, 618 (7th Cir. 1982). The Sixth Circuit found no special relationship between the State and Janan nor between Janan and the parolee and thus affirmed the dismissal of the §1983 claims.

In the recent case of *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189,109 S.Ct. 998,103 L.Ed. 2d 249 (1989), the Winnebago County (Wisconsin) Department of Social Services had received complaints about physical abuse by DeShaney's father. Despite these complaints and despite the presence of physical evidence that DeShaney was being abused, the County failed to remove DeShaney from his father's custody. Finally, DeShaney was beaten so severely that he sustained permanent brain damage. DeShaney and his mother sued Winnebago County under §1983 claiming that the County's failure to act deprived the boy of his liberty in violation of the Due Process Clause. In affirming the dismissal of the suit, the Supreme Court stated that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The Court concluded that "the State had no constitutional duty to protect [DeShaney] against his father's violence, [and] its failure to do so — though calamitous in hindsight — simply

does not constitute a violation of the Due Process Clause." *Id.*

In response to the motion to dismiss, and to the holdings in *Martinez*, *Janan*, and *DeShaney*, plaintiffs argue that their cause of action is based on the City's alleged failure to train its police officers as to the proper procedures for reporting traffic accidents. Plaintiffs assert that it was the policy of the City of Carlisle not to train its police officers and the adoption of such a policy renders the City liable under §1983 pursuant to a theory of municipal liability. Numerous cases are cited to support this proposition. These cases reveal that generally, a city can be liable under §1983 for failing to train its employees if such failure to train may fairly be said to represent a policy," however, it must also be shown that the policy "actually causes injury." *Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989).

Most of the cases cited by plaintiff, for the proposition that a City can be liable under §1983, are easily distinguishable from the present case by the fact that the injury to the plaintiff was caused directly by the action of a *municipal employee*.[5] In these cases where the proximate cause of the

---

[5]The cases distinguishable on this point are *Canton*, (alleged failure by police officers to provide necessary medical care to plaintiff who was in custody); *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985)(police officer accused of using deadly force when such was not justified); *Wierstak v. Heffernan*, 789 F.2d 968 (1st Cir. 1986)(police officer accused of using excessive force); *Rymer v. Davis*, 775 F. 2d 756 (6th cir. 1985)(police officer accused of using excessive force); *Warren v. City of Lincoln*, Neb., 816 F. 2d 1254 (8th Cir. 1987)(alleged arrest without probable cause); *Fiacco v. City of Rensselaer*, N.Y., 783 F. 2d 319 (2d Cir. 1986)(police officer accused of using excessive force); *Spell v. McDaniel*, 824 F. 2d 1380 (4th Cir. 1987)(police officer accused of using excessive force); *Rock v. McCoy*, 763 F. 2d 394 (10th Cir. 1985)(police officer accused of using excessive force).

plaintiff's injuries is shown to be a city's failure to train its employees, a § 1983 claim is cognizable. In the present case, a private individual was the proximate cause of the plaintiffs' injuries. In such situations, as in *Martinez, Janan, and DeShaney*, the general rule is that the State is not liable under §1983 for the deprivations caused by the private individual. However, plaintiffs have also cited authority contrary to this general rule of non-liability; and it is these cases that merit discussion.[6]

In *Wood v. Ostrander*, 879 F. 2d 583 (9th Cir. 1989), *cert. denied* ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed. 2d 305 (1990), Washington State Trooper Ostrander pulled over and arrested a drunk driver in the Parkland area of Pierce County, Washington; an area with a high rate of aggravated criminal activity. Ostrander also impounded the drunk driver's car, which left Wood, who was the driver's female passenger, without transportation. After refusing assistance from Ostrander, Wood undertook a five-mile walk home, at 2:30 a.m., through the Parkland area. Before reaching her home, Wood was picked up by an unknown driver who took her to a secluded area and raped her. The Ninth Circuit allowed a § 1983 suit by Wood against Ostrander after reasoning that "[t]he fact that Ostrander arrested [the driver], impounded his car, and apparently stranded Wood in a high-crime area

---

[6]Two other cases cited by plaintiffs can be deemed inapplicable without lengthy discussion. In *Fisher v. City of Cincinnati*, 753 F. Supp. 681 (S.D. Ohio 1990), Fisher claimed a constitutional deprivation by the City of Cincinnati of the right to access to the courts in violation of the First Amendment. This is a substantive right that is "independent of the Fourteenth Amendment due process clause." *Id.* at 687-688. Also *Gregory v. City of Rogers, Ark.*, 921 F. 2d 750 (8th Cir. 1990), has been vacated by the Eighth Circuit at 939 F. 2d 524 (8th Cir. 1991), and cannot be cited as a valid authority.

at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety." *Id.* at 590.

In *Cornelius v. Town of Highland Lake Ala.*, 880 F. 2d 348 (11th Cir. 1989), *cert. denied* 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed. 2d 785 (1990), the Mayor of the Town of Highland Lake requested that the Alabama Department of Corrections provide the City with inmate labor for general maintenance of the town hall building and grounds. Two of the work squad inmates, working in and around the town hall, abducted the Highland Lake Town Clerk from the town hall, stole her car, and forced her to accompany them on a three state flight during which time they terrorized her. The Eleventh Circuit allowed a § 1983 action by the clerk against the town by finding that the State had the power and authority to direct the actions of the inmates and that a responsibility thereby was imposed on the State. *Id.* at 356. Further, because the clerk and the State "stood in a special relationship to one another", the responsibility of the State was to protect the clerk from the inmates whom it controlled and whom the State placed in the proximity of the clerk. *Id.*

Both of these cases present a situation where the State, by an affirmative exercise of its power, has acted upon a specific individual, and made that individual less capable of caring for him or herself and more vulnerable to a specific danger. Such State created limitation on an individual's ability to care for himself creates a corresponding State duty to provide for that individual's reasonable safety. *DeShaney*, at 200; *Janan* at 560.

However, in the present case, even if the City of Carlisle knew of the dangers that Byrd presented to the general public, the City played no part in the creation of such danger,

nor did it do anything to render the plaintiffs more vulnerable to that danger. Under such circumstances, the State has no duty to members of the general public who are injured as a result of actions by third parties, even when the State indirectly facilitated those actions. *DeShaney* at 201; *Martinez* at 284-285.

This must be so because:

> "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."
>
> "[The Fourteenth Amendment] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."

Id. at 195. It is only through certain affirmative actions taken by the State towards individuals that a duty may be created in the State to assume responsibility for that individual's safety and general well-being. *Id.* at 200. The victim, as opposed to the general public, must face some special danger as a result of State action. *Janan*, at 560. In the present case, the City of Carlisle has taken no affirmative actions towards the plaintiffs and thus had no duty to assume responsibility for the plaintiffs' safety.

The case of *Gibson v. City of Chicago*, 910 F. 2d 1510 (7th Cir. 1990) does not require a different result. Gibson's survivor brought a § 1983 action against the City after Gibson was shot and killed by a police officer who had been placed on the

medical roll as mentally unfit for duty. Although the police officer was relieved of all of his police powers, the City failed to confiscate his firearm, which he used to kill Gibson. The Seventh Circuit found that the police department "affirmatively trained and outfitted one of its employees with the means to exercise deadly force, yet failed to recover that equipment from its employee after it had determined that the employee was unfit to exercise police authority." *Id.* at 1522 n. 19. Even though it was found that the police officer was not acting in the scope of his employment but was instead acting as a private individual, the § 1983 action was allowed, because the State, through the police department, played a significant role in creating the danger to the victim. *Id.* at 1519. This case therefore differs from the others cited by plaintiffs in that no special relationship existed between the State and the victim. Instead, the special relationship existed between the State and the police officer, who was viewed in the posture of a private individual. It was because of this special relationship that the Seventh Circuit distinguished *Martinez*, and *DeShaney* and permitted the §1983 claim against the State.

Plaintiffs would have this Court apply the rationale of the Seventh Circuit to the present case.[7] Even if this Court were inclined to adopt the position of the Seventh Circuit, *Gibson* would be inapplicable to the present case. The relationship between the State and the police officer, which was essential to the holding in *Gibson*, is not analogous to the relationship between Byrd and the City of Carlisle. Carlisle cannot be said to have "created the danger" as was done by

---

[7] The Sixth Circuit has not adopted the approach taken by the Seventh Circuit, and for this reason alone, this Court would decline to apply *Gibson*.

the City of Chicago in *Gibson*. *Id*. at 1521 n. 19. The most that can be said of the relationship between Byrd and the City of Carlisle is that the Carlisle Police purposefully allowed Byrd to continue operating a motor vehicle. State allowance of a private citizen's continuation of known dangerous behavior did not, for the Supreme Court in *DeShaney*, create a duty in the State to protect against that danger, and this Court cannot view the same situation differently.

No special relationship existed between the City and the plaintiff nor between Byrd and the plaintiffs. Also, Carlisle took no affirmative action that placed the plaintiffs in special danger as compared to the general public. Finally, no relationship existed between the City and Byrd such that the City can be said to have created the dangers that Byrd presented. Under such circumstances plaintiffs' § 1983 must be dismissed.

If this seems a harsh result[8], it should be remembered that dismissal of the § 1983 claims against the City in no way forecloses any liability of the City under theories of state tort law.[9] Dismissal of the §1983 claims merely comports with the rule that the Fourteenth Amendment does not transform every tort committed by a State actor into a constitutional violation. *DeShaney* at 202.

---

[8] Although the recognition that plaintiffs have no cause of action under § 1983 does not produce in the present case so harsh as was seemingly produced in *Martinez*, *Janan*, and *DeShaney*.

[9] Claims almost identical to those raised in this suit are pending before the Nicholas Circuit Court. This state case is further along than the present case (twenty-five depositions have been taken in the Nicholas County case as compared to one deposition in the present case).

In its motion to dismiss, the City of Carlisle also argues that if the Court dismisses plaintiffs' § 1983 claims, then the remainder of the complaint, which consists mainly of pendant state claims, should also be dismissed for lack of subject matter jurisdiction. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed. 2d 720 (1987).

Plaintiffs respond that along with their § 1983 claims, they have asserted claims against Risk Mutual for a declaratory judgment on the issue of the amount of coverage under the underinsured motorist policy. Thus, it is plaintiffs' position that even if the §1983 claims are dismissed, there remains before the Court a declaratory judgment action, and the lawsuit should not be completely dismissed.

Pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). This Court will comply with the recommendation of the Supreme Court when it stated that where "state issues substantially predominate, whether in terms of proof, [or] of the scope of the issues raised," a federal court should normally relinquish jurisdiction to the appropriate state court. *Carnegie-Mellon Univ.*, at 350 n. 7. The declaration of rights sought by plaintiffs against Risk Mutual does not alter this Court's discretion. The Supreme Court has made it clear that federal courts should exercise their discretion when determining the propriety of issuing a declaratory judgment. *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S.Ct. 641, 92 L.Ed. 784 (1948).

The Declaratory Judgment Act, 28 U.S.C. § 2201, confers no absolute right upon a litigant. *Green v. Mansour*, 474 U.S. 64, 72, 106 S.Ct. 423, 88 L.Ed. 2d 371 (1985) (quoting *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 73 S.Ct. 236, 97 L.Ed. 291(1952)).

It is this Court's judgment that adjudication of all claims in the Nicholas Circuit Court advances the interests of judicial economy, convenience, and comity. Thus, all remaining claims will be remanded to the Nicholas Circuit for appropriate disposition.

This ruling makes moot all other pending motions: the City of Carlisle's motion for abstention, plaintiffs' motion for a hearing, and plaintiffs' motion to file a reply to the reply of the City.[10]

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That the motion of the City of Carlisle to dismiss all § 1983 claims is GRANTED, that the § 1982 claims are DISMISSED, and plaintiffs shall take nothing thereby;

(2) That the motion of the City of Carlisle to dismiss all remaining claims for lack of subject matter jurisdiction is GRANTED and all remaining claims shall be REMANDED to the Nicholas Circuit Court for appropriate disposition;

---

[10] Plaintiffs sought to file a reply to the reply in order to respond to the case of *Nishiyama v. Dickson County, Tenn.*, 814 F. 2d 277 (6th Cir. 1987), cited for the first time in the reply of the City. This case was not necessary to the disposition of the City's motion and this, a reply by plaintiffs in unnecessary.

(3) That the motion of the City of Carlisle for abstention is DENIED as MOOT;

(4) That plaintiffs' motion to amend their complaint is DENIED;

(5) That plaintiffs' motion for a hearing is DENIED as MOOT;

(6) That plaintiffs' motion to file a reply is DENIED as MOOT;

(7) That this matter is DISMISSED and shall be STRICKEN from the docket;

This 12 day of June, 1992.

/s/ HENRY R. WILHOIT, JR., JUDGE

Eastern District of Kentucky
FILED JUL 21 1992
at LEXINGTON
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES, PLAINTIFFS,

AND

AIK SELECTIVE
SELF INSURANCE INTERVENING PLAINTIFF,

VS.

CITY OF CARLISLE,
KENTUCKY, et al., DEFENDANTS.

ORDER

This case was dismissed, pursuant to the Memorandum Opinion and Order of this Court, on June 12, 1992. Plaintiffs have filed a motion to alter, amend or vacate the June 12th Opinion along with a motion for oral argument. Plaintiffs have also filed a motion for permission to file an amended complaint. The facts of this matter are set out in the June 12th Opinion and will not be restated here.

In plaintiffs' motion to alter, amend or vacate, they state that their complaint was dismissed on the ground that no "special relationship" exists between Mark Byrd and defendant City of Carlisle. Plaintiffs argues that dismissal on

these grounds was erroneous because the "special relationship" analysis was rejected by the Supreme Court in *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989). Both of these assertions by plaintiffs are mistaken.

The Court in DeShaney did not reject the special relationship analysis but merely decided that no special relationship existed under the facts of the case. See *Id.* at 197-199 Likewise, this Court found that there was no special relationship in the present case. This, however, was not the whole of this Court's holding, but merely a component. This Court went on to find that "Carlisle took no affirmative action that placed the plaintiffs in special danger as compared to the general public" and that the City cannot be said to have "created the dangers that Byrd presented." Under these circumstances, this Court is bound to apply the rulings of the Supreme Court and hold that "the State had no constitutional duty to protect [the plaintiffs]." *Id.* at 201.

Plaintiffs also argue that even if their §1983 claims are dismissed, their declaratory judgment action, based on diversity of citizenship, should not have been dismissed. Plaintiffs go on to state that their claims of state tort liability "will have to be tried to resolve the declaratory judgment proceeding and the ensuing claims of Preferred Risk." It is precisely for this reason that this Court must decline to hear plaintiff's claims for declaratory judgment. See *Allstate Ins. Co. v. Mercier*, 913 F. 2d 273 (6th Cir. 1990).

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That plaintiff's motion to alter, amend or vacate this Court's Memorandum Opinion and Order of June 12, 1992 is DENIED;

(2) That plaintiff's motion for an oral argument is DENIED;

(3) That plaintiff's motion for leave to file its tendered amended complaint is DENIED as MOOT.

This 20 day of July, 1992

/s/ HENRY R. WILHOIT, JR. JUDGE

FILED
OCT 13 1993
LEONARD GREEN, CLERK

NO. 92-6103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES RICKY JONES,
VERA JONES,
Plaintiffs-Appellants,

AIK SELECTIVE SELF
INSURANCE FUND,
Intervenor

v.

ORDER

CITY OF CARLISLE, KENTUCKY;
PREFERRED RISK MUTUAL INSURANCE
COMPANY; MARK BYRD,
Defendants-Appelleses

BEFORE: GUY and SUHRHEINRICH, Circuit Judges; and DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel

---

* Hon. David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1

42 U.S.C. Section 1983

Kentucky Revised Statute Section 95.015 (Michie ed.)

Kentucky Revised Statute Section 95.710 (Michie ed.)

Kentucky Revised Statute Section 95.760 (Michie ed.)

Kentucky Revised Statute Section 95.740 (Michie ed.)

Kentucky Revised Statute Section 186.570 (Michie ed.)

Kentucky Revised Statute Section 189.290 (Michie ed.)

Kentucky Revised Statute Section 189.635 (Michie ed.)

Kentucky Revised Statute Section 431.450 (Michie ed.)

601 Kentucky Administrative Regulation 13:010

U.S. CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suits in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ky. Rev. Stat. § 95.015. Rights and duties of police and fire fighters – Members of the police and fire departments in cities and urban-county governments shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided, that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and

said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside.

Ky. Rev. Stat. § 95.710. Qualifications of members of police and fire departments. – To be eligible for appointment as a member of the police force or fire department of a city of the fourth or fifth class, except cities of the fourth class which have adopted KRS 95.761 to 95.784, a person must be a resident of the county, at least twenty-one (21) years of age, able to read and write the English language intelligibly, and sober, moral and sagacious. No person who has been convicted of a felony is eligible for appointment. After appointment no member shall interfere in any election.

Ky. Rev. Stat. § 95.760. Oath of policemen. – In cities of the fourth and fifth classes except cities of the fourth class which have adopted KRS 95.761 to 95.784, every member of the police force shall take an oath to faithfully perform the duties of his office, and that he possesses the required qualifications. In cities of the fourth class the oath shall also provide that he will not interfere in any election.

Ky. Rev. Stat. § 95.740. Powers of chief of police and policemen – Fees – Deputies – Special police. – (1) The chief of police and every member of the police force in cities of the fourth and fifth classes may, whether directed to them or not, execute warrants of arrest, processes, subpoenas and attachments for witnesses. They may arrest as prescribed by law for offenses against ordinances or municipal regulations

of the city, and shall have the same power of arrest for offenses against the state as a sheriff.

(2) The chief of police and members of the police force shall be entitled to the same fees, and the same remedies for collecting them, that are allowed by law to sheriffs and other officers for similar services, but the city legislative body may, by ordinance, direct that the fees be paid into the city treasury when the chief of police and members of the police force are employed on a salary.

(3) The chief of police may appoint deputies, by and with the advice and consent of the city legislative body, who shall have the same powers and duties as the chief of police except that they shall not command the police force.

(4) The chief of police may appoint special or extra police, by and with the advice of the mayor. These special or extra police, appointed for less than a week, shall take the oath prescribed by law but shall not be required to execute bond.

Ky. Rev. Stat. § 186.570. Suspension or denial of license; hearing; surrender of certificate

(1) The cabinet or its agent designated in writing for that purpose may deny any person an operator's license or may suspend the operator's license of any person, or, in the case of a nonresident, withdraw the privilege of operating a motor vehicle in this state, subject to a hearing and with or without receiving a record of conviction of that person of a crime, whenever the cabinet has reason to believe that:

(a) That person has committed any offenses for the conviction of which mandatory revocation of a license is provided by KRS 186.050.

(b) that person has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury or serious property damage.

(c) That person is afflicted with mental or physical infirmities rendering it unsafe for him to drive upon the highways.

(d) That person is an habitually reckless or negligent driver of a motor vehicle or has committed a serious violation of the motor vehicle laws.

(e) That person has been issued a license without making proper application for it, as provided in KRS 186.412 and regulations properly issued pursuant to it.

(f) A person required by KRS 186.480 to take an examination has been issued a license without first having passed the examination.

(g) That person has been convicted of assault and battery resulting from the operation of a motor vehicle.

(h) That person has failed to appear pursuant to a citation or summons issued by a law enforcement officer of this Commonwealth or any other jurisdiction.

(2) The cabinet or its agent designated in writing for that purpose shall provide any person subject to the suspension, revocation or withdrawal of their driving privileges, under provisions of this section, a hearing. Upon determining that such action is warranted, the cabinet shall notify the person in writing by mailing the notice to the person by first class mail to the last known address of the person. Such hearing shall be automatically waived if not requested within twenty (20) days after the cabinet mails the notice. The hearing shall be scheduled as early as practical within not to exceed twenty (20) days after receipt of such request at a time and place designated by the cabinet.

(3) The cabinet may suspend the operator's license of any resident upon receiving notice of the conviction of that person in another state of an offense there which if committed in this state would be grounds for the suspension or revocation of an operator's license. If a person so convicted is not the holder of a Kentucky operator's license, the cabinet shall deny him a license for the same period as if he had possessed a license and license had been suspended. The cabinet may, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws, forward a notice of that person's conviction to the proper officer in the state of which the person so convicted is a resident.

(4) The Transportation Cabinet is forbidden from suspending or revoking an operator's license or assessing points or any other form of penalty against the holder thereof for speeding violations or speeding convictions form other states. This subsection shall apply only to speeding violations. This section shall not apply to a commercial driver's license.

(5) Each operator's license which has been cancelled, suspended or revoked shall be surrendered to and retained by the cabinet. At the end of the period of cancellation, suspension or revocation the license may be returned to the licensee after he has complied with all requirements for the issuance or reinstatement of his driving privilege.

Ky. Rev. Stat. § 189.290. Operator of vehicle to drive carefully. – (1) The operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway.

(2) No person shall wilfully operate any vehicle on any highway in such a manner as to injure the highway.

Ky. Rev. Stat. § 189.635. Vehicle accident reports by operators, law enforcement officers, and agencies. – (1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event the operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days

after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident.

Ky. Rev. Stat. § 431.450. Uniform citation. –

(1) The department of state police in consultation with the transportation cabinet shall design, print, and distribute to all law enforcement agencies in the Commonwealth a uniform citation.

(2) The citation shall:

(a) Be approved by the Supreme Court;

(b) Consist of an original document and five (5) copies;

(c) Be serially numbered in such a manner that the year of issue and the individual citation number may be readily ascertained, and

(d) Contain such other information as may be required by the Supreme Court.

(3) The circuit court clerk shall maintain a system of accountability for all citations issued in accordance with rules and regulations issued by the Supreme Court to assure that citations are not wrongfully destroyed, tampered with, or otherwise compromised in any manner.

(4) All peace officers in the Commonwealth shall use the uniform citation for all violations of the traffic laws and for all felonies, misdemeanors and violations

601 Kentucky Administrative Regulation 13:010. Medical Review Board; basis for examination, evaluation, tests.

RELATES TO: KRS 186.570(1)(c)

STATUTORY AUTHORITY: KRS 186.400

NECESSITY AND FUNCTION: The Medical Review Board has existed by virtue of administrative regulations since June, 1964. Subjects who come to the department's attention because of physical or mental problems which may affect their driving ability are required to submit to physical examinations. The results of these exams are then reviewed by the physicians on the board. Based on their professional experience they recommend either total denial of a license or a limited one (e.g. daylight hours, left and right rearview mirrors, another examination in three (3) months, etc.), or they determine that the disability suffered should not affect the person's driving ability. This negates the capriciousness which could exist in the great discretion granted the department by the legislature in KRS 186.570. Whenever the recommendation of the board is for suspension or an extremely limited license, the subject is entitled to a hearing on the matter (since the Supreme Court's BELL v. BURSON decision) and this regulation sets out the procedure for same.

Section 1. There is hereby created a Medical Review Board to determine whether any applicant for or any holder of a valid Kentucky operator's license has physical or mental infirmities which affect or limit the driving ability or make it unsafe for said person to operate a motor vehicle upon the public highways. The board shall consist of the Commissioner of the Department of Vehicle Regulation of the transportation Cabinet or his representative, not less than three (3) physicians licensed to practice medicine in the Commonwealth of Kentucky, and anyone else deemed necessary to properly review a case brought before the board. The physicians on the board shall be appointed by the Commissioner of the Department of Vehicle Regulation. The Commissioner of the Department of Vehicle Regulation or his representative shall prescribe the time and place for the board to meet. Any proceeding conducted by the board shall be construed to be a meeting within the meaning of this section when three (3) physician members are present and participating. Members of the board who participate in a meeting shall be reimbursed for necessary expenses incurred in attending such meeting.

Section 2. (1) When the Commissioner or the Department of Vehicle Regulation or his representative receives notice that one (1) or more of the conditions listed in Section 4 of this regulation exists in a person and that such physical or mental infirmities may render it unsafe for him to operate a motor vehicle upon the public highways, the commissioner shall refuse to issue an operator's license to said person or he shall suspend the existing driving privilege of said person unless the person submits to an examination by a qualified physician within forty-five (45) days of notification of the commissioner's intentions.

(2) If the Medical Review Board deems that an examination by a qualified physician is necessary. The required

medical examination shall be conducted at the person's own expense by any licensed physician of his choice. The examining physician shall report within forty-five (45) days the results of his examination directly to the Medical Review Board on a form furnished by the Department of Vehicle Regulation.

(3) As soon as possible after receipt of the completed form the Medical Review Board shall evaluate it and may make recommendations to the Department of Vehicle Regulation for further examination or testing or on restriction of the person's driving privilege. When the board recommends further examination or investigative testing the Commissioner of the Department of Vehicle Regulation or his representative shall notify the person of the date by which he shall comply in order to retain or obtain his driving privilege.

Section 3. When the Medical Review Board pursuant to Section 2(3) of this regulation recommends total suspension of a person's driving privilege or any limitations thereon, the Commissioner of the Department of Vehicle Regulation or his representative shall notify the person at the last known address of said person that this action will be taken unless a written request for a hearing before the board is received within twenty (20) days following delivery of the notice. The hearing shall be scheduled as early as practicable at a time and place designated by the commissioner or his representative and notice of same shall be mailed to the person involved no later than ten (10) days prior to the hearing date. The commissioner or his representative shall preside at the hearing before the Medical Review Board and at least three (3) physician members shall be present. The presiding officer may administer oaths and may issue subpoenas for the

attendance of witnesses and the production of relevant books and papers. the scope of the hearing shall be limited to the presentation of the evidence upon which the Medical Review Board made their recommendation and any medical evidence the petitioner wishes to present in explanation or refutation of this evidence. Evidence may be presented in the form of depositions. All testimony at the hearing shall be recorded and together with any depositions or exhibits introduced at the hearing shall form the complete record. Within ten (10) working days after the hearing the commissioner shall issued a decision and this shall be promptly forwarded to the petitioner.

Section 4. The Commissioner of the Department of Vehicle Regulation or his representative shall promptly notify the person involved to submit to the physical examination set out in Section 2 of this regulation when one (1) or more of the following conditions exist:

(1) Driver has indicated that he "blacked out" lost consciousness or suffered a seizure prior to a reportable motor vehicle accident;

(2) Driver has been named in an affidavit by at least two (2) citizens as being incapable of properly operating a motor vehicle due to physical or mental infirmities.

(3) Driver has been reported by a physician as being incapable of driving safely due to physical or mental condition or due to medication prescribed for an extended time:

(4) Driver has been reported by a law enforcement officer after being observed driving or behaving in an erratic or dangerous manner which indicates a possibility of physical or mental infirmity;

(5) Applicant for operator's license or for renewal of same has obvious physical or mental impairment:

(6) Driver's official record kept by the Department of Vehicle Regulation indicates a possibility of physical or mental impairment;

(7) Driver has reported that he/she has suffered an epileptic seizure or any type of syncopal episode;

(8) Driver has been reported by a commonwealth attorney, county attorney, county clerk, circuit clerk, sheriff, or judge as being incapable of driving due to a physical or mental impairment.

APPENDIX C

Eastern District of Kentucky
FILED NOV 5 1991
AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON
CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES — PLAINTIFFS,

VS. **COMPLAINT**

CITY OF CARLISLE,
KENTUCKY, PREFERRED
RISK MUTUAL INSURANCE
COMPANY, and MARK BYRD — DEFENDANTS.

*** *** ***

For their complaint herein, plaintiffs state as follows:

COUNT I

JURISDICTION

1. This Court has jurisdiction of Count I pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, and venue as per 28 U.S.C. §1391.

2. At all times relevant hereto Mark Byrd was a citizen and resident of the Commonwealth of Kentucky, primarily residing in Carlisle, Nicholas County, Kentucky.

3. Mark Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since infancy.

4. Mark Byrd obtained a Kentucky motor vehicle operator's license in 1983.

5. Carlisle, Kentucky (hereinafter Carlisle), is a municipality with a population of 1800 people approximately, located in Nicholas County, Kentucky, and Carlisle exists and acts under authority of the law of the Commonwealth of Kentucky and in the instant case acts under color of state law.

6. Carlisle has the power to sue and be sued.

7. Carlisle has established and maintains a police force by authority of state law and under color of state law.

8. The statutory law of the Commonwealth of Kentucky is embodied in the Kentucky Revised Statutes (hereinafter KRS).

9. As per KRS 95.015, the members of the Carlisle Police Department are to enforce the statutory laws of the Commonwealth of Kentucky.

10. As per KRS 95.710, the members of the Carlisle Police Department are to be sagacious.

11. As per KRS 95.760, the members of the Carlisle Police Department are required to faithfully perform the duties of their office.

12. As per KRS 431.450, the Carlisle police are to use a uniform citation for all violations of traffic laws as are listed in KRS 431.451, one of which laws is KRS 189.290 requiring that motor vehicles be operated carefully.

13. As per KRS 95.740, the police of Carlisle have law enforcement power and responsibility throughout Nicholas County, Kentucky.

14. KRS 189.635 requires that a Carlisle policeman investigating an automobile accident which causes damage to a motor vehicle or which causes a personal injury, to file a written report of the accident with the Carlisle Police Department.

15. KRS 189.635 requires the Carlisle Police Department to file the written report of an accident mentioned in numerical paragraph 14 above, with the Kentucky State Police.

16. KRS 186.570 allows the Commonwealth of Kentucky to withdraw the motor vehicle operator's license of a person having a mental or physical infirmity making that person unsafe to operate a motor vehicle.

17. 601 Kentucky Administrative Regulation (hereinafter KAR) 13:010 is a valid regulation of the Commonwealth of Kentucky.

18. As per 601 KAR 13:010, if the Commonwealth of Kentucky receives notice that a motor vehicle operator has suffered a seizure prior to a reportable motor vehicle accident, if a law enforcement official reports to the Commonwealth of Kentucky that a motor vehicle operator is driving in a manner as to indicate the driver has a possibility of a physical or mental infirmity, if a motor vehicle operator's official record indicates the possibility of a physical or mental infirmity, or if a motor vehicle operator reports he has suffered an epileptic seizure, then the Commonwealth of Kentucky will cause that motor vehicle operator to submit to a medical examination to determine the motor vehicle

operator's fitness to operate a motor vehicle, and if the operator is unfit to operate a motor vehicle, then the operator's license will be suspended or withdrawn by the Commonwealth of Kentucky.

19. Shortly after receiving his motor vehicle operator's license in 1983, Mark Byrd experienced a seizure while operating a motor vehicle on Main Street in Carlisle and ran off the road, hit a stone wall in front of the Nicholas County Courthouse and was knocked unconscious. This accident was investigated by the Carlisle Police Department, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

20. On or about June, 1983, Mark Byrd suffered an epileptic seizure while driving a motor vehicle on Main Street in Carlisle and crossed over the center-line of the roadway and struck a tractor coming in the opposite direction while that tractor was occupied. This accident was investigated by the Carlisle police, and the Carlisle police maintain a report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

21. In 1984, Mark Byrd suffered an epileptic seizure while operating a motor vehicle on Mockingbird Lane in Carlisle, and his vehicle left the roadway, traveled across the lawn of a residence, and struck a residence. This accident was investigated by the Carlisle Police Department, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

22. In 1985, Mark Byrd was operating a motor vehicle on Main Street in Carlisle, and his operation of the motor

vehicle was such that it left the roadway and struck a parking meter near the United States Post Office in Carlisle. It is unknown whether the Carlisle police were aware of this accident or investigated it, and the Carlisle police have no report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

23. In 1986, Mark Byrd was operating a motor vehicle on the public roads of Carlisle and experienced an epileptic seizure and pulled to the side of the road and passed out. This accident caused property damage. The accident was investigated by the Carlisle police, but the Carlisle police have no report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

24. In 1987, Mark Byrd was operating a motor vehicle on the public roadways of Carlisle and experienced an epileptic seizure which caused the vehicle operated by Mark Byrd to leave the roadway and hit a fire hydrant near Small's Greenhouse in Carlisle. This accident was investigated by the Carlisle police, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

25. In 1987, Mark Byrd suffered an epileptic seizure while operating a motor vehicle in Carlisle, and Mark Byrd's vehicle left the roadway and hit a structure known as Small's Greenhouse. This accident was investigated by the Carlisle police, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

26. Within the past five years, Mark Byrd was found suffering a seizure in a motor vehicle near the Dairy Queen in Carlisle, and this event was investigated and assistance

was rendered by fire and rescue personnel of Carlisle. Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this event.

27. On or about November 13, 1990, on U.S. Hwy. 68, a public highway in Nicholas County, Kentucky, Mark Byrd was operating a motor vehicle while he experienced an epileptic seizure causing him to lose control of his vehicle and causing his vehicle to cross over the center-line into the oncoming lane of traffic and strike head-on a motor vehicle there and then operated by the plaintiff, James Ricky Jones, and this accident severely and permanently injured James Ricky Jones. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

28. With the exception of the accident occurring on or about November 13, 1990, the Kentucky State Police does not have reports of any of Mark Byrd's accidents mentioned herein.

29. It is the deliberate policy or custom of Carlisle not to train its policemen subsequent to their employment.

30. It is the deliberate policy or custom of Carlisle not to supervise its policemen so as to determine if they follow the laws of the Commonwealth of Kentucky.

31. It is the deliberate policy or custom of Carlisle not to report all of Mark Byrd's motor vehicle accidents as required by state law.

32. At all times subsequent to Mark Byrd's first seizure related automobile accident, Carlisle knew that Mark Byrd was an unfit and unsafe motor vehicle operator by reason of Mark Byrd's epileptic condition.

33. Carlisle's failure to train its police and failure to supervise its police have caused the Carlisle police to be inadequate to the task to be performed by them, especially as concerns duties of the police as regards unfit and unsafe operators of motor vehicles.

34. The actions of Carlisle as alleged herein are reckless and wanton and constitute gross negligence.

35. It is the policy or custom of Carlisle to let Mark Byrd operate a motor vehicle even though Carlisle knows Mark Byrd is an unfit and unsafe driver, and it is the policy or custom of Carlisle not to enforce the laws of the Commonwealth of Kentucky regarding the operation of motor vehicles against Mark Byrd. The effect of these policies or customs is in fact to encourage Mark Byrd to drive a motor vehicle. The actions and policies or customs of Carlisle are substantially certain to result in deprivation of rights secured to United States citizens such as James Ricky Jones by the United States Constitution, including without limitation rights secured to James Ricky Jones by the Fourteenth Amendment to the United States Constitution.

36. The actions and policies or customs of Carlisle have caused James Ricky Jones to suffer a deprivation of rights secured to him by the United States Constitution, including without limitation those rights secured to him by the Fourteenth Amendment to the United States Constitution.

37. The actions and policies or customs of Carlisle as enumerated herein amount to a deliberate indifference to the constitutional rights of persons such as James Ricky Jones who use the public highways in Carlisle and in Nicholas County, Kentucky.

38. James Ricky Jones as a citizen of the United States of America and as a citizen of the Commonwealth of Kentucky is entitled to protections of the laws of the United States and of the Commonwealth of Kentucky.

39. The actions and policies or customs of Carlisle are abusive in that they amount to a conscious decision not to enforce the laws of the Commonwealth of Kentucky against Mark Byrd and this conscious decision is a deliberate indifference to the rights of James Ricky Jones and those similarly situated, said decision causing James Ricky Jones to be deprived of rights secured to him under the United States Constitution, including without limitation rights secured to him by the Fourteenth Amendment to the United States Constitution.

40. The actions and policies or customs of Carlisle have injured James Ricky Jones, and because of this, Carlisle is liable to pay damages to James Ricky Jones in the amount of Three Million Dollars ($3.0 Million).

41. As per 42 U.S.C. §1988, James Ricky Jones is entitled to recover a reasonable attorney's fee against Carlisle.

COUNT II

42. They reaffirm and re-allege the allegations contained in paragraphs 1 through 41 of this complaint.

43. The Court has ancillary and/or pendent jurisdiction of this Count II due to the fact that the allegations herein arise from a common nucleus of operative facts involved in other counts.

44. At all times relevant hereto, the City of Carlisle, Kentucky, was acting through its agents and employees, acting in the real and/or apparent course and scope of their

agency or employment.

45. At all times relevant hereto, the City of Carlisle, Kentucky, owed a duty to the plaintiffs herein to exercise ordinary care in providing police protection and law enforcement for the benefit of the plaintiffs herein and the public at large.

46. Prior to November of 1990, the City of Carlisle, Kentucky, knew or should have known that Mark Byrd was an unsafe, dangerous, and unfit operator of a motor vehicle and that Mark Byrd had been involved in numerous automobile accidents caused by Mark Byrd's seizure disorder.

47. The City of Carlisle, Kentucky, breached the duty it owed to plaintiffs by negligently and carelessly providing police protection and law enforcement, and this breach of duty was a substantial factor in causing an automobile accident involving Mark Byrd and James Ricky Jones on or about November 13, 1990, on U.S. Hwy. 68 in Nicholas County, Kentucky.

48. Pursuant to KRS 189.635, the City of Carlisle, Kentucky, owed a duty to plaintiffs to file reports of automobile accidents involving Mark Byrd. The City of Carlisle, Kentucky, breached this duty and the breach was a substantial factor in causing the automobile accident, occurring on or about November 13, 1990, involving Mark Byrd and James Ricky Jones.

49. As a direct result of the aforementioned automobile accident, James Ricky Jones has incurred and will incur pain and suffering, has lost wages, has incurred and will incur medical expenses, and his power to work and earn money has been impaired permanently, all to his damage in the amount of $3.0 Million Dollars.

50. Vera Jones is the wife of James Ricky Jones, and as a result of the negligence of the City of Carlisle, Kentucky, she has suffered loss of consortium with her husband, to her damage in the amount of Five Hundred Thousand Dollars ($500,000.00).

51. The actions of the City of Carlisle, Kentucky, were reckless and wanton and constitute gross negligence, thereby entitling plaintiffs to punitive damages in an amount to be determined.

52. The actions of the City of Carlisle, Kentucky are conduct carried out by them with a flagrant indifference to the rights of the plaintiffs and with a subjective awareness that such conduct will result in human death or bodily harm, thereby entitling plaintiffs to punitive damages in an amount to be determined.

COUNT III

53. They re-affirm and re-allege the allegations contained in paragraphs 1 through 52 of this complaint.

JURISDICTION

54. This Court has jurisdiction of Count III pursuant to 28 U.S.C. §1332r 28 U.S.C. §2201, 28 U.S.C. §2202, and Federal Rule of Civil Procedure 57.

55. Alternatively, the Court has ancillary and/or pendent jurisdiction of this Count III due to the fact that the allegations herein arise from a common nucleus of operative facts involved in other counts.

56. Plaintiffs are citizens of Kentucky.

57. Preferred Risk Mutual Insurance Company (hereinafter Preferred) is a citizen of the State of Iowa, is not a citizen of the State of Kentucky, and does not have a principal place of business in the State of Kentucky.

58. The amount in controversy under Count III is in excess of Fifty Thousand Dollars ($50,000.00).

59. Preferred is a corporation duly authorized and existing by authority of law with the power to sue and be sued, and it is qualified to carry on an insurance business in the Commonwealth of Kentucky.

60. Preferred entered into an insurance contract in Kentucky with plaintiffs by which plaintiffs purchased underinsured motorist coverage, which coverage is applicable to the accident mentioned hereinabove occurring on or about November 13, 1990.

61. Mark Byrd is an underinsured motorist because his automobile liability insurance coverage is insufficient to compensate plaintiffs for their losses.

62. Preferred owes plaintiffs the sum of One Hundred Thousand Dollars ($100,000.00) under the underinsured motorist coverage issued by Preferred, and plaintiffs have performed all conditions precedent to recovery.

63. A real and actual controversy exists between Preferred and plaintiffs concerning whether the liability limit on the underinsured motorist coverage in the insurance contract issued by Preferred is Fifty Thousand Dollars ($50,000.00) or One Hundred Thousand Dollars ($100,000.00).

64. Plaintiffs contend that the underinsured motorist limit of liability is One Hundred Thousand Dollars ($100,000.00) per person and Preferred contends that the

limit of liability on the underinsured motorist coverage is Fifty Thousand Dollars ($50,000.00) per person.

65. Plaintiffs request the Court to declare that the underinsured motorist limit of liability under the aforementioned insurance contract issued by Preferred is One Hundred Thousand Dollars ($100,000.00) per person.

COUNT IV

66. They re-affirm and re-allege the allegations contained in paragraphs 1 through 65 of this complaint.

67. The Court has ancillary and/or pendent jurisdiction of this Count IV due to the fact that the allegations herein arise from a common nucleus of operative facts involved in the other counts.

68. On or about November 13, 1990, on U.S. Hwy. 68, a public highway in Nicholas County, Kentucky, Mark Byrd so carelessly and negligently operated a motor vehicle so as to cause it to collide with a motor vehicle being operated by James Ricky Jones.

69. As a direct and proximate result of the aforementioned negligence, James Ricky Jones has incurred and will incur pain and suffering, has lost wages, has incurred and will incur medical expenses, and his power to work and earn money has been impaired permanently, all to his damage in the amount of $3.0 Million Dollars.

70. Vera Jones is the wife of James Ricky Jones, and as a direct and proximate result of Mark Byrd's negligence, she has suffered loss of consortium with her husband, all to her damage in the amount of Five Hundred Thousand Dollars ($500,000.00).

DEMAND FOR JURY TRIAL

The plaintiffs demand a trial by jury on all issues so triable.

WHEREFORE, the plaintiffs demand:

1. Under Count I, James Ricky Jones demands judgment against Carlisle, Kentucky, in the amount of $3.0 Million Dollars plus a reasonable attorney's fee;

2. Under Count II, James Ricky Jones demands judgment against Carlisle, Kentucky, in the amount of $3.0 Million Dollars, Vera Jones demands judgment against Carlisle, Kentucky, in the amount of Five Hundred Thousand Dollars ($500,000.00), and plaintiffs demand judgment against Carlisle, Kentucky, for punitive damages in an amount to be determined;

3. Under Count III, James Ricky Jones demands judgment against Preferred Risk Mutual Insurance Company declaring that the insurance contract sold to him by Preferred Risk Mutual Insurance Company provides underinsured motorist coverage in favor of James Ricky Jones in the amount of One Hundred Thousand Dollars ($100,000.00), and James Ricky Jones demands judgment against Preferred Risk Mutual Insurance Company in the amount of One Hundred Thousand Dollars ($100,000.00);

4. Under Count IV, James Ricky Jones demands a judgment against Mark Byrd in the amount of $3.0 Million Dollars, and Vera Jones demands judgment against Mark Byrd in the amount of Five Hundred Thousand Dollars ($500,000.00);

5. A trial by jury; and

6. Their costs herein expended.

SUIT, McCARTNEY & PRICE

BY: /s/ Frank H. McCartney
207 Court Square
Flemingsburg, Kentucky 41041
(606) 849-2338

ROSENBAUM & ROSENBAUM, P.S.C.
BY: /s/ Leslie Rosenbaum
LESLIE ROSENBAUM
KIMBERLY HUNT PRICE
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507-1289
(606) 259-1321
ATTORNEYS FOR PLAINTIFFS

Supreme Court, U.S.
FILED
FEB 8 1994
OFFICE OF THE CLERK

No. 93-1107

In The

Supreme Court of the United States

October Term, 1993

JAMES RICKY JONES
and VERA JONES,

Petitioners,

v.

CITY OF CARLISLE,
KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JANE DURKIN SAMUEL
Counsel of Record for Respondent

LESLIE PATTERSON VOSE
LANDRUM & SHOUSE
106 West Vine Street
P.O. Box 951
Lexington, Kentucky 40588-0951
Telephone: (606) 255-2424

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause places an affirmative duty on the state[1] to protect the liberty of its citizens against invasion by private actors where no evidence exists that the state itself restrained the citizen's liberty and/or played any role in creating the danger.

---

[1] "State" means municipal police department for purposes of this Petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

I. The Sixth Circuit's Decision is Not in Conflict With the Applicable Decisions of This Court ... 4

II. The Circuits Are Not in Conflict With the Applicable Decisions of This Court, Nor Are They in Conflict With Each Other 13

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

American Eagle Credit Corp. v. Gaskin, 920 F.2d 352 (6th Cir. 1990) 3

Balistreri v. Pacifica Police Department, 901 F.2d 696 (9th Cir. 1990) 23

Black by Black v. Indiana Area School District, 985 F.2d 707 (3rd Cir. 1993) 16, 18

Bowen v. American Hospital Association, 476 U.S. 610 (1986) 3

Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. 1991), cert. denied, 111 S. Ct. 2827 (1991) 18

Canton v. Harris, 489 U.S. 378 (1989) 9

Collins v. City of Harker Heights, Lex., 112 U.S. 1061 (1992) 11

Cornelius v. Town of Highland Lake, Ala., 880 F.2d 348 (11th Cir. 1989), cert. denied, 110 S. Ct. 1784 (1990) 15, 21, 24

D.R. v. Middle Bucks Area Voc Tech, 972 F.2d 1364 (3rd Cir. 1992), cert. denied, 113 S. Ct. 1045 (1993) 8, 17, 18

Dawson v. Milwaukee Housing Authority, 930 F.2d 1283 (7th Cir. 1991) 21

DeShaney v. Winnebago Soc. Service, 489 U.S. 189 (1989) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Doe v. Taylor Independent School District, 975 F.2d 137 (5th Cir. 1992), cert. denied, 113 S. Ct. 1066 (1993) 20

Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993) 17

Germany v. Yance, 868 F.2d 9 (1st Cir. 1989) 8

Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990) 17, 21, 22

Gregory v. City of Rogers, Ark., 974 F.2d 1006 (8th Cir. 1992), cert. denied, 113 S. Ct. 1265 (1993) 22

Griffith v. Johnston, 889 F.2d 1427 (5th Cir. 1990) 9

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1991) 16

Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991), cert. denied, 112 S. Ct. 656 (1991) 23

Janan v. Trammell, 785 F.2d 557 (6th Cir. 1986) 15

K. H. through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990) 21

L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992), cert. denied, 113 S. Ct. 2442 (1993) 22

Losinski v. County of Trempealeau, 946 F.2d 544 (7th Cir. 1991) 22

Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), cert. denied, 113 S. Ct. 1266 (1993) 23

Martinez v. California, 444 U.S. 277 (1980) 12

McKee v. City of Rockwall, Tex., 877 F.2d 409 (5th Cir. 1989), cert. denied, 110 S. Ct. 727 (1990) 19

TABLE OF AUTHORITIES – Continued

Page

Monahan v. Dorchester Counseling Center, 961 F.2d 987 (1st Cir. 1992) 16, 18

Nishiyama v. Dickson County, Tenn., 814 F.2d 277 (6th Cir. 1987) 15

Norfleet v. Arkansas Department of Human Services, 989 F.2d 289 (8th Cir. 1993) 22

Piechowitz v. U.S., 885 F.2d 1207 (4th Cir. 1989) 18

Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992) 20

Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991) 21

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) ...22, 23

Youngberg v. Romeo, 457 U.S. 307 (1982) 16

STATUTES

KRS 189.635 1

KRS 431.450 1

ARTICLE

Frankfurter and Hart, *The Business of the Supreme Court at October, 1933*, 48 Harv. L. Rev. 238, 268-269 (1934) 13

STATEMENT OF THE CASE

The Petitioners' Statement of the Case omits key facts which support the legal grounds upon which the Sixth Circuit based its decision.

Defendant, Mark Byrd, obtained his driver's license from the state, via the circuit clerk in 1983. (See Petitioners' Appendix C, p. 52a). Since that time he has been involved in various motor vehicle accidents, the majority of which occurred in the Respondent, City of Carlisle. (See Petitioners' Appendix C, pp. 54a-56a). Several of these accidents were caused by his epileptic disorder. A few were reported to the City of Carlisle and several were attended to by the City of Carlisle. (See Petitioners' Appendix C, pp. 54a-55a). The last accident or epileptic incident to occur on the roadways of Carlisle, Kentucky, prior to Petitioner's 1990 accident was 1987. (See Petitioners' Appendix C, p. 55a).

On November 13, 1990 Mark Byrd was involved in a seizure related accident in which he struck the Petitioner, James Ricky Jones's motor vehicle head on, resulting in injury to the Petitioner. (See Petitioners' Appendix C, p. 56a).

According to the Petitioners' theory, several statutes in Kentucky require the Respondent, Carlisle police department officials, to file accident reports for all accidents with the state police and to issue citations for all violations of traffic laws. While the Respondent did not agree with such an overly broad interpretation of the statutory duties imposed by Kentucky Revised Statutes (KRS) 431.450 and 189.635, for the purposes of the Rule 12(b)(6) motion filed before the district court and the

appeal taken by Petitioners to the Sixth Circuit, these facts were taken as true.

Simply put, Petitioners asserted that by failing to file accident reports of each and every accident involving Mark Byrd, as well as to issue citations against Byrd for driving and having an epileptic seizure, the Respondent deprived the Petitioner of his constitutional rights, specifically the Fourteenth Amendment right to substantive due process. The Petitioners also asserted pendent state claims against the Respondent for negligence, loss of consortium and punitive damages. (See Petitioners' Appendix C, pp. 59a-60a).

The district court relying on precedent of this Court, granted Respondent's Rule 12(b)(6) motion. (See Petitioners' Appendix A, pp. 15a-29a). In this Opinion and Order, the district court also overruled Petitioners' earlier Motion to Amend to assert Fifth and Fourteenth Amendment violations. (See Petitioners' Appendix A, p. 16a, n. 2). Petitioners then moved the district court to alter, amend or vacate the Opinion and Order. Simultaneously, Petitioners moved to amend their complaint a second time. The district court overruled both motions. (See Petitioners' Appendix A, pp. 31a-33a).

Petitioners then appealed to the Sixth Circuit, which after briefing and oral argument, affirmed the result of the district court, on *de novo* review. (See Petitioners' Appendix A, pp. 3a-14a). On Petition for Rehearing En Banc the Sixth Circuit denied the Petition. (See Petitioners' Appendix A, pp. 35a-36a).

In addition, it should be specifically noted that although Petitioners' Statement of the Case paraphrases

deposition testimony of Ronald Clark, Ronald McDonald, Darryl McFarland, Valerie Taylor, Mark Byrd, Roy Fryman and Frank Hughes, such testimony was specifically not examined by the lower courts and should not be considered part of the record on appeal. (See Petitioners' Appendix A, p. 5a, n.2). Moreover, all of these depositions, with the exception of Valerie Taylor, were taken in Petitioners' parallel state cause of action, not in this federal action.

Finally, while the entire text of each decision is set forth in the Appendix for full examination by this Court, the Petitioners rely on their own interpretations of the district court and Sixth Circuit decisions to summarize these rulings. (See Petition for Writ of Certiorari, pp. 6-7). Moreover, contrary to Petitioners' interpretations, the Sixth Circuit's review of the district court Opinion and Order was a *de novo* review. *American Eagle Credit Corp. v. Gaskin*, 920 F.2d 352 (6th Cir. 1990). Similarly, this Court reviews appellate court "judgments," not written opinions. *Bowen v. American Hosp. Ass'n.*, 476 U.S. 610 (1986). Thus, the specific wording of the district court Opinion and Order is not relevant to the issue on review.

ARGUMENT

By requesting that their Petition be granted, Petitioners desire to revisit matters this Court previously has addressed at length. Moreover, the interpretations of these issues by the Circuit Courts of Appeal are in accord. Although disguised by rhetoric, the Petitioners' sole purpose in seeking Writ of Certiorari is to ultimately obtain

reversal of this Court's earlier decision in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989). (Petition for Writ of Certiorari, pp. 12-14.) There is no conflict between the Sixth Circuit's decision in the instant case and *DeShaney*; nor is there any true conflict among the circuits on the application of *DeShaney*. Accordingly, the Petition should be denied.

I. THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides that petitions for writ of certiorari will be granted "only when there are *special* and *important* reasons therefor." S.Ct.R.10(a). While one such stated reason is where a United States Court of Appeals has decided an important question of federal law in a way that conflicts with applicable decisions of this Court, it is well established that mere assertion of conflict with Supreme Court precedent will not suffice. S.Ct.R.10(a)(c).

Accordingly, Petitioners' assertions that the Sixth Circuit decision in the instant case is in conflict with this Court's ruling in *DeShaney* are insufficient. 489 U.S. 189. There must indeed *be* a conflict between the two holdings. A careful reading of *DeShaney* and its application by the Sixth Circuit reveals there is no conflict.

In *DeShaney*, this Court examined an issue that had troubled the lower courts for several years: when, if ever, does the failure of a government official to provide an individual with adequate protective services constitute a violation of the individual's due process rights? *Id.* at 194.

Joshua DeShaney was beaten and permanently injured by his father with whom he resided. DeShaney asserted that local social workers and other government officials had received complaints that he was being abused, but did not act. DeShaney filed suit claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause. Specifically, DeShaney argued that his relationship with the government officials, *i.e.*, their knowledge of his plight, and their intentions to provide assistance had set him apart from the general public, thus causing the state to acquire an affirmative duty to act, which duty the state then breached.

As a cornerstone to its decision, this Court set forth the following general rule:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression,". . . . Its purpose was to protect the people from the State, not to

> insure that the State protected them from each other.

Id. at 195-196 (citations omitted).

Expanding upon the above principles, this Court then noted its previous development of the general rule:

> [t]hat the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid maybe necessary to secure liberty, life, or property interests of which the government itself may not deprive the individual . . . . As we said in *Harris v. McRae*, "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted *governmental* interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be liable under the clause for injuries that could have been averted had it chosen to provide them. *As a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."*

Id. at 196-197, (citations omitted) (footnote omitted) (emphasis original and added) (quoting *Harris v. McRae*, 448 U.S. 297, 317-318 (1980)).

Having set down these general rules and observations about the Due Process Clause, this Court in addressing DeShaney's argument that the state knew he faced a special danger, fashioned the following "exception" to the general rule:

> [W]hen the State by the affirmative exercise of its power *so restrains an individual's liberty* that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs e.g. food, clothing, shelter, medical care, and *reasonable safety* it transgresses the substantive limits on state action by the Eighth Amendment and the Due Process Clause.

Id. at 200 (emphasis added). Thus, the affirmative duty to act was found, not to emanate from the state's knowledge of the victim's plight or from its promises to help, but rather from the "limitation which it has imposed on his freedom to act on his own behalf." *Id.*

Intending merely to provide instructional examples on this rule by drawing on precedent, this Court then opined:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, *or other similar restraint of personal liberty* which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. (emphasis added) (footnote omitted). Hence, the first lesson of *DeShaney* is that generally the state has no affirmative duty to act to protect an individual from outside harms, unless the state has interfered or impinged upon the individual's liberty to protect himself.

Further, this Court went on to note that while Joshua DeShaney acknowledged that the state in *his situation* had not "created his danger," the actual creation of danger by

the state, such as placing an individual in a more vulnerable position, could then place a duty on the state to protect the individual from the danger created. *Id.* at 201-202. The genesis of this theory of potential duty appears to lie in the Court's opinion that where an individual's ability to protect himself, *i.e.*, liberty, is "restrained" by the state's actions, there is a "deprivation of liberty" triggering the protections of the Due Process Clause.

Accordingly, *DeShaney* did not, as Petitioners argue, overrule the "special relationship" theory of liability, nor did *DeShaney* stand for merely one theory of liability. Rather *DeShaney* 1) reaffirmed the purpose of the Due Process Clause; 2) set down the general rule of non-liability for failure to protect an individual from outside forces; 3) established the exception to this rule – that where a state actor so restrains an individual to render him vulnerable to outside forces, a "deprivation of liberty" occurs (generally found in, but *not* limited to, "custodial" relationships); and 4) acknowledged that deprivation of liberty may also occur where the state creates the danger.

Further Petitioners are arguing over semantics in asserting that *DeShaney* did away with the "special relationship" test. Rather, *DeShaney* merely rejected one type of "special relationship" analysis (state knew victim faced a special danger) for another (circumstances where state restrains victim's freedom thus rendering him more vulnerable). Indeed many courts in specifically adhering to *DeShaney*, refer to a "special relationship custody" analysis. *See, e.g., Germany v. Yance*, 868 F.2d 9, 23 (1st Cir. 1989); *D.R. v. Middle Bucks Area Voc Tech*, 972 F.2d 1364,

1368 (3rd Cir. 1992), *cert. denied* 113 S.Ct. 1045 (1993); *Griffith v. Johnston*, 889 F.2d 1427, 1439 (5th Cir. 1990).

Turning now to a review of the Sixth Circuit's decision in the instant case it is clear that that decision is not in conflict with the rules of *DeShaney*.

First, the Sixth Circuit, directly quoting this Court, cited the cornerstone of *DeShaney* that while no state is permitted to deprive any person of life, liberty or property without due process, such does not serve to protect a citizen's life, liberty or property from a private actor's invasions; the Due Process Clause is a limitation on state's power to act, not a guarantee of certain minimal levels of safety and security. (See Petitioners' Appendix A, p. 7a). This is certainly not in conflict with this Court's decision in *DeShaney*.

Second, the court in relying on *DeShaney* found that because no relationship existed between Byrd, the tort feasor, and the city or between the city and Mr. Jones, "circumstances" did not exist to create an affirmative duty of care and protection. (See Petitioners' Appendix A, p. 10a and n.4).

Third, the court addressed Petitioners' argument that the City of Carlisle "caused" the Petitioner's injuries and noted that Byrd, the epileptic driver, not the City, caused the injuries. (See Petitioners' Appendix A, p. 11a). Again, such a ruling was not only supported by the undisputed facts of the case at bar, but was also consistent with this Court's opinions in *DeShaney*, and *Canton v. Harris*, 489 U.S. 378 (1989). *DeShaney* stands for the proposition that liability may exist where the state created the danger; *Harris* espouses that a state could be liable if its policy or

custom was the "moving force" behind the constitutional violation. 489 U.S. at 201; 489 U.S. at 389.

Fourth, the Sixth Circuit examined Petitioners' claim that he was "entitled to protection" and relying on *DeShaney*, affirmed the dismissal of this claim as nothing more than a failure to protect claim. (See Petitioners' Appendix A, p. 12a). This is consistent with this Court's ruling that "the Due Process Clause . . . does not confer an *entitlement* to such [governmental aid]." 489 U.S. at 196.

Fifth, the court of appeals, citing yet another cornerstone of *DeShaney*, ruled that it would not extend the Due Process Clause to cover common law tort actions between private citizens. 489 U.S. 202 (See Petitioners' Appendix A, p. 12a).

In summary, a careful comparison of this Court's ruling in *DeShaney* and the Court of Appeals' decision in the instant case clearly evidenced that the Sixth Circuit's decision was consistent in result and legal opinion, rather than in conflict. Accordingly, it would be a waste of judicial economy to grant Petitioners' request, as the result would remain the same.

Furthermore, Petitioners also argue that there is no place for a "special relationship" analysis in Section 1983 liability. Rather, Petitioners assert that where a governmental entity refuses to enforce the laws of that state, such an abuse rises to the level of a constitutional tort. Essentially, the Petitioners desire that this Court supplant the Due Process Clause and the duties it creates with traditional tort law duties. However, this Court has previously spoken at length on this issue and has ruled

emphatically that where the victim is injured by a third party or outside force, and not a state actor, there can be no constitutional liability unless 1) the State has affirmatively restrained the individual's liberty, thus rendering him more vulnerable, or 2) the State by its affirmative acts created the danger. 489 U.S. 189. Moreover, this Court has spoken on numerous occasions regarding the place for tort law in such a constitutional analysis stating, "we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort." *Collins v. City of Harker Heights, Lex.*, 112 U.S. 1061, 1070 (1992).

It is clear that in arguing that the Sixth Circuit is in conflict with Supreme Court precedent, the Petitioners merely seek to revisit and *expand* upon the rules established in *DeShaney*. However, this Court has stated:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive [him] of that right.

Id. at 1068.

In closing, it is noted that the Sixth Circuit's decision in the instant case is also consistent in result with this

Court's pre-*DeShaney* decision of *Martinez v. California*, 444 U.S. 277 (1980) in which this Court held that state officials were not liable when a parolee murdered a 15 year old girl. Petitioners have implied that *Martinez* has been overruled by the *DeShaney* decision, in that this Court stated, "we reject this argument," in response to Joshua DeShaney's argument that a "special relationship" existed between Joshua and the state because the state knew that Joshua faced a special danger of abuse at the hands of his father. 489 U.S. at 189.

Respondent respectfully submits that not only did *DeShaney* not overrule this Court's earlier decision in *Martinez*, but as this Court noted in *DeShaney*, *Martinez* was decided on the much narrower ground of "causal connection between the state's acts and the murder." 489 U.S. at 197, n.4. There is no language in *DeShaney* to indicate that the *Martinez* ruling, *i.e.*, that the release of the parolee was too attenuated to establish a deprivation of constitutional rights, has been overruled.

Accordingly, given the facts in the instant case, it is clear that the result reached by the Sixth Circuit in this case is fully supported by not only *DeShaney*, but *Martinez*. As the facts cited in the Petitioners' own complaint indicate, the last contact that the Respondent had with the epileptic driver, Mark Byrd, was in 1987, some *three years* prior to the accident between Petitioner and Byrd. Such an accident in 1990 is too remote a consequence of the Respondent's actions or inactions in 1987 to hold them liable under Section 1983.

II. THE CIRCUITS ARE NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR ARE THEY IN CONFLICT WITH EACH OTHER.

Pursuant to Supreme Court Rule 10, a petition for writ of certiorari may also be granted where one circuit has rendered a decision in conflict with the decision of another circuit. S.Ct.R. 10(1)(a). However, once again, the conflict must be a true conflict that can only be effectively resolved by the Supreme Court. Furthermore, the conflict must be one that will be resolved by the particular case before it. Frankfurter and Hart, *The Business of the Supreme Court at October, 1933*, 48 Harv. L. Rev. 238, 268-269 (1934). Thus, conflicts arising from the particular applications of general rules turning upon the analysis of special states of fact, do not support the granting of a petition for writ. *Id.*

A careful review of the twelve circuits' decisions cited by Petitioners indicate that their "conflict" argument arises merely from the differing semantics and factual differences of each, as well as a misinterpretation of *DeShaney*. 489 U.S. 189. For example, several circuits utilize the language "special relationship" in order to determine whether an affirmative duty existed under the Due Process Clause, while other circuits cite to "custodial" relationships and still others cite to "special circumstances." However a close look at each case indicates that the circuits are not in conflict on the teachings of *DeShaney, i.e.* that in *"certain limited circumstances,"* where the state has through its actions so restrained the freedom of an individual that he cannot protect himself *or* has

created the danger or rendered the individual more vulnerable to the danger, the Due Process Clause places a duty on the state to protect the individual from outside dangers. 489 U.S. at 198, 201 (emphasis added).

In addition, while this case by case examination proves some courts rely on a "relationship" analysis to determine liability and others rely on a "creation of danger" analysis, such does not prove a conflict exists. The analysis utilized and result reached by a court in a particular case is entirely dependent upon the particular facts and nature of the claims asserted. Hence, the fact that one circuit utilized a "relationship" analysis, another a "creation of danger" analysis, and yet another both standards, is explained by the factual inconsistencies in the compared cases, not by a conflict in the circuits.

Furthermore, *DeShaney* espouses several rules on Due Process liability, *i.e.* 1) the general rule of no duty; 2) the exception where the state has itself deprived the citizen of liberty; and 3) that liability may exist where the state created the danger. Thus, it is not a conflict for a circuit to utilize one teaching of *DeShaney*, rather than another, where the facts/claims asserted call for such.

SIXTH CIRCUIT

The Court of Appeal's decision in the instant case is not in conflict with the other circuits.

First, like the other circuit decisions since *DeShaney*, the Sixth Circuit found that in "certain limited circumstances", ones that might be called "special relationships", the state has an affirmative duty to protect or prevent third party violence. (See Petitioners' Appendix A, pp. 9a-10a, p. 10a, n.4).

Second, like other circuits, the court also adhered to the ultimate teachings of *DeShaney* on "creation of danger". Petitioners had argued to the Sixth Circuit that Respondent itself had "caused" the auto accident between Petitioner and the epileptic driver. The Court in dicta noted that, unlike in *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), the Respondent had not done anything to create or cause the danger faced by Jones. (See Petitioners' Appendix A, p. 11a); *cf.*, 489 U.S. at 201.

Third, while decided prior to *DeShaney*, Respondent respectfully asserts that even the Sixth Circuit's earlier decisions of *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986) and *Nishiyama* are consistent in result with *DeShaney*, and the other circuits. In *Janan*, the state parole board had done nothing to create the particular danger faced by the victim when he was murdered by a parolee. *Accord*, 489 U.S. at 201. Nor was there any evidence that the state parole board had restrained the victim's freedom through custody or other means. *Accord*, 489 U.S. at 199-200. Yet in *Nishiyama* there was evidence that the Dickson County police had itself created the danger faced by the victim in providing its prisoner with a fully equipped patrol car. *Accord, Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784 (1990); *cf.*, 489 U.S. at 201 (where victim acknowledged state had

done nothing to create danger, and evidence was in accord.)

D.C. CIRCUIT

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1991) involved an individual who was placed in police custody after overdosing on PCP, and who later died following and/or during such custody. In examining the limited issue of whether the arresting officers were entitled to qualified immunity, the court of appeals specifically reviewed the teachings of this Court in *DeShaney*, i.e. whether the officers assumed a duty from the limitations which they imposed on Harris in arresting him. There was no need, however, to address a "creation of danger" theory as the Plaintiff had not asserted such a theory, nor had the evidence indicated the officers had "created the danger", for example, by giving Harris the PCP he overdosed on. *Accord, Black by Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993).

FIRST CIRCUIT

Monahan v. Dorchester Counseling Center, 961 F.2d 987 (1st Cir. 1992), arose when a voluntarily committed mental patient jumped from a public mental facility's van and was struck by another auto. Once again, this court of appeals turned directly to the teachings of *DeShaney* and this Court's earlier decision of *Youngberg v. Romeo*, 457 U.S. 307 (1982), to determine if these circumstances gave rise to a relationship between the state and the victim,

whereby the state assumed a duty. *Accord, D.R. v. Middle Bucks Vo. Tech. School*, 972 F.2d 1364. In addition, because Monahan specifically argued that "the [state] created, or at least rendered him more vulnerable to a danger," the appellate court also examined this analysis. 961 F.2d at 992-93.

SECOND CIRCUIT

Alternatively, *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993) did not look to the custodial or special relationship analysis, but jumped directly to the issue of creation of danger. However, the analytical approach used by this court was *not* due to some "conflict" among circuits, but rather arose from the particular facts and claims of that case. *Id.* at 99. *Accord, Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Dwares*, the plaintiffs were demonstrators who were beaten by skin-heads while attending a rally in Washington Square Park. The attack occurred in the presence of defendant police officers and the plaintiff alleged that the officers specifically "conspired" with, and directly "aided and abetted in," the skin-heads attack. *Id.* Thus, the court was not called upon to address a "custodial" or "special relationship" theory, but was instead required to turn to the "creation of danger" teachings of *DeShaney*. Furthermore, this is the only case cited by Petitioners that dealt with an unusual "conspiracy" claim and this in itself would lead to a slightly different treatment than that given in cases where no such facts/claims exist.

THIRD CIRCUIT

Similar to *Monahan, Brown v. Grabowski*, 922 F.2d 1097 (3rd Cir. 1991), *cert. denied*, 111 S.Ct. 2827 (1991), a domestic violence case, dealt with claims that the state had a "custodial relationship" and in the alternative that the state "created the danger." *Id.* at 1114-1116. It is specifically noted that although this court of appeals may have utilized the language "custodial" rather than "special relationship," the court's analysis is the same as that used by this Court in *DeShaney* and other circuits, *i.e.* that the state did not restrain the freedom of the victim to act on her own. *Id.* at 1115-1116.

Similarly, in *D.R. v. Middle Bucks Area Vo. Tech. School*, a case involving students who were molested by other students during school hours, the plaintiffs asserted both "special relationship" and "creation of danger" arguments. 972 F.2d 1364. Accordingly, the court of appeals was called upon to address both claims, and in citing *DeShaney*, followed the analysis first of whether attendance at school amounted to a "restraint on personal liberty" and second, whether the state did anything to create plaintiffs' danger or render them more vulnerable. *Id.* at 1369-1368, 1373-1375; *cf., Black by Black*, 985 F.2d 707 (where court only examined "special relationship" analysis because plaintiff did not assert, nor did facts indicate, "creation of danger" issue).

FOURTH CIRCUIT

In *Piechowitz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989) the survivors of witness in criminal trial sued government

officials alleging the officials failed to prevent their relative's murder by a contract killer. Because the facts did not indicate that defendants had acted to restrain the decedents' liberty and freedom to protect themselves, the court citing *DeShaney*, affirmed summary judgment on behalf of the defendants. *Id.* at 1214-1213. The court did not address a "creation of danger" analysis because the plaintiffs did not make such a claim, nor was there any supporting evidence of such a claim.

FIFTH CIRCUIT

McKee v. City of Rockwall, Tex., 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 727 (1990) dealt with another unfortunate domestic violence victim who was injured when police ignored her request that her husband be arrested. Respondent seriously questions this case's application to the "conflict" analysis on review. *McKee* arose not from a due process "failure to protect" or "creation of danger" claim, but rather from the assertion that the officers discriminated against McKee because of her gender, *i.e.* violation of equal protection. 877 F.2d at 413. However, it is noted that the court of appeals did look to *DeShaney* for assistance in determining whether a duty to arrest did exist and its analysis was no different from the other circuits in examining the relationship between the victim and the state. Further, the lack of a more detailed "custodial relationship" analysis is arguably due only to the lack of special relationship or custodial facts.

In addition, while *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1066 (1993), a school molestation case, gives the appearance of being in conflict with other circuits that have found school attendance does not give rise to a duty to protect, the apparent inconsistency is irrelevant to the instant case. In *Doe*, a young girl was repeatedly exposed to sexual advances and contact by a high school teacher. Though the school officials were repeatedly warned, the school took no action. Relying on *DeShaney*, and the *specific facts presented* in *Doe*, the Court of Appeals found that the school, by its abhorrent actions, had essentially taken Jane Doe into its custody and restrained her freedom to protect herself.

Thus, *Doe* is not in conflict with the other circuits because *Doe* turned on facts particular only to that case. Moreover, it is well-established that writ of certiorari should not be granted where the alleged conflict would not be corrected in the case on review. As the instant case does not deal with when school attendance creates a "custodial relationship," any conflict on this issue will not be remedied. *See* 489 U.S. at 201, n.9.

In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) the court examined both the "special relationship/restraint on freedom" and the "creation of danger" issues in finding that the estate of a hostage victim killed by gunman during confrontation had not asserted a constitutional claim against the sheriff. *Id.* at 308-309. This is the same analysis utilized in *DeShaney* and relied upon by the other circuits when the appropriate facts/claims are present.

489 U.S. at 199-201. *Accord*, 961 F.2d at 992-993; 922 F.2d at 1114-1116.

SEVENTH CIRCUIT

Petitioners assert that the Seventh Circuit does not utilize a relationship analysis when appropriate. This is simply incorrect.

While the court in *Gibson*, did not rely on a custodial or special relationship analysis, this was due only to the fact that plaintiff's claims sprang from a "creation of danger" or "causation" argument. 910 F.2d at 1519-1523, 1521, n.19. Plaintiff made no claim of, nor was there evidence to support, a "relationship" that gave rise to a duty to protect. Moreover, it is important to note, that unlike the facts in the instant case, evidence existed to indicate the state had "created the danger," in that it had trained and *armed* the defendant officer who shot the plaintiff. *Accord, Cornelius*, 880 F.2d 348.

Alternatively, in *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991), *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991) and *K. H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) the Seventh Circuit *did* utilize a "special relationship/custodial" analysis, rather than a "creation of danger" because the particular facts/claims in those cases required it. 940 F.2d at 237 (Salazar was a pre-trial detainee in the custody of the defendants); 930 F.2d at 1284 (plaintiff alleged that by being a housing authority resident, he was in "custody" of the defendants); 914 F.2d at 848-849 (where state assumed "custody" of K.H. by removing her from her

parents' custody and placing her in state foster care). *Accord, Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993); *See also, Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991). The key again to all three cases is not, as Petitioners argue, that the state knew the foster homes to be abusive or were concerned about the excesses of governmental power, but rather whether the state actors so restrained the plaintiff that he/she could not act on his/her own. (See Petition for Writ of Certiorari, p.19).

EIGHTH CIRCUIT

In *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1265 (1993) the Eighth Circuit, relying heavily on *DeShaney*, analyzed both whether a relationship existed between the victim and the defendants such that the victim's freedom to act was restrained and whether the state through its actions created plaintiff's predicament. *Accord*, 980 F.2d 299; 972 F.2d 1364.

NINTH CIRCUIT

Like *Gibson*, the court in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) found liability where an officer stranded passengers after detaining driver. Once again the officer had interfered with the plaintiff's freedom, placing her in a position of vulnerability she would not have been in had he not acted at all. *Id.* at 590; *Accord, L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*,

113 S.Ct. 2442 (1993) (where court, relying on *DeShaney's* special relationship exception and danger creation exception held facts gave rise to liability because although plaintiff was not in custody and therefore, no relationship existed, the state created the danger).

Alternatively, in *Balistreri v. Pacifica Police Department*, 901 F.2d 696 (9th Cir. 1990), the Ninth Circuit looked only to the "relationship" analysis in finding the state did not assume an affirmative duty to protect the domestic violence victim. The court was not asked by the plaintiff, nor called upon by the facts, to look beyond this issue – no evidence or claim existed that the state itself created the danger.

TENTH CIRCUIT

Petitioner asserts the Tenth Circuit's decision of *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 656 (1991) is inconsistent with *Wood*. 879 F.2d 583. However, unlike *Wood*, *Hilliard* only dealt with the *limited* issue of whether in *1988*, prior to *DeShaney*, the law was clearly established that the defendant police had an affirmative constitutional duty to protect passenger of automobile from danger when car was impounded. 930 F.2d at 1520. Accordingly, it is impossible to state that the Tenth Circuit is in conflict with the Ninth Circuit, when this circuit has not ruled on the particular factual issue presented in *Wood*.

Alternatively, in *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1266 (1993) the Tenth Circuit did address the "custodial relationship" issue

when it was presented with facts calling for such an analysis. Consistent with all other circuits, except perhaps the Fifth, the court found that attendance at school did not amount to restraint of freedom to act.[2] However, once again the court was not called upon and therefore did not discuss "creation of danger."

ELEVENTH CIRCUIT

Finally, in *Cornelius*, the Eleventh Circuit relied on *DeShaney* to find that the victim's danger, *i.e.*, attack by an inmate on work release, had been created by the town officials, in that they brought the prisoner to city hall and provided him with his weapon, a knife. 880 F.2d at 356. *Accord*, 910 F.2d 1510. Furthermore, the court, under the facts presented found that a custodial or special relationship existed because the plaintiff as an employee required to work at the same location as the third party criminal. *Id.* at 356-357.

In summary, it is clear that while a superficial examination of the circuits may indicate that a conflict exists, a thorough review of each case, including the facts asserted and the analysis utilized by the appellate courts, unequivocally indicates that no conflict exists with regard to the issue on review.

[2] As noted previously, this conflict is not relevant to the case on review and would not be corrected if certiorari were granted. 489 U.S. at 201, n.9.

CONCLUSION

The Sixth Circuit decision is entirely consistent in both legal theory and result with the precedent of this Court. In addition, the Sixth Circuit decision in this case is not in conflict with any other circuit concerning the issue on review. This Court has spoken at great length regarding the issue on review, and the legal theories developed by this Court have been appropriately applied given the facts in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JANE DURKIN SAMUEL
Counsel of Record

LESLIE PATTERSON VOSE
LANDRUM & SHOUSE
106 West Vine Street
P. O. Box 951
Lexington, Kentucky 40588-0951
Telephone: (606) 255-2424

Attorneys for Respondent